

423

DEPARTMENT OF TRANSPORTATION



COAST GUARD LAW BULLETIN

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MARITIME AND INTERNATIONAL LAW

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COAST GUARD CIVIL PENALTY PROCEDURES

Your inquiry concerns our new civil penalty enforcement regulations. You particularly sought our comments on an article in "Boating" magazine which was critical of the regulations. The author's opinion was that an administrative agency could not fairly assess civil penalties under one of the statutes it enforces, and that the regulations in question do not meet due process standards. He preferred that a court be available to retry civil penalty cases in which the Coast Guard has assessed a civil penalty. I would like to take this opportunity to explain this subject in some detail.

In the past decade, Congress has chosen to utilize the civil penalty as a means for enforcing the greatly burgeoning number of federal statutes and regulations. Although the civil penalty was virtually unknown ten years ago, there are now over 300 statutory civil penalty programs being enforced by 26 federal departments and agencies. In 131 of these, Congress placed the duty of assessment upon an agency rather than on a court. Among the agency-assessed penalty systems administered by the Coast Guard are those established by the Federal Boat Safety Act, the Ports and Waterways Safety Act, and the Federal Water Pollution Control Act Amendments. These statutes annually result in the Coast Guard having to administratively process between twenty and thirty thousand violation cases, of which approximately ten thousand result in some assessed penalty. In view of the fact that this is one of the largest administrative penalty caseloads placed on any federal agency, it was necessary that a system of procedural regulations be devised for handling cases efficiently but with full regard to the due process rights of the party being charged. I am enclosing a copy of the regulations for your convenience.

To the extent that the author of the article suggests that an agency assessment of a civil penalty should be subject to a complete trial in court, after there has already been a full administrative hearing, this is a matter beyond the ability of the Coast Guard to control. The type of subsequent judicial proceeding available in a penalty case is a matter determined by legislation and by certain precedential guidelines established by the U.S. Supreme Court. While the courts have not yet reached a clear position on whether or not a full judicial trial will be available, the interest of judicial economy would seem to militate against a new trial in cases where the agency has already held a fair hearing and resolved the factual issues. In his article, the author stated that:

If you go to court, you may challenge only the legal right of the police to make the complaint, not whether the case was decided properly. And that's it-your case is over, and it's all been between you and the police department as prosecutor, judge and jury.

However as mentioned above, the issue of what happens when you go to court has not been finally decided. In some courts, parties unhappy with Coast Guard assessments were able to obtain a trial. However, even in those cases where there was no trial per se, the courts have decided whether the penalty was properly decided. In the courts not employing a trial, the agency has had to prove to the satisfaction of the federal judge that: (a) there was substantial evidence presented at the administrative hearing establishing the fact that the party penalized actually violated the law or regulation; (b) the amount of the penalty was not arbitrary or capricious; (c) that proper procedures were followed; and (d) that the agency did not otherwise act contrary to law in its assessment action. Thus, there is recourse to federal court for those persons who wish a judicial determination as to whether the penalty was properly assessed.

The following comments apply to some of the specific points of the article:

(1) To the statement that evidence in a Coast Guard proceeding can be "taken note of" in a manner different from that in a court: Each decision of a Coast Guard Hearing Officer must be based on the evidence introduced before him. Only in very limited instances may notice be taken of a fact and, in those instances, the party charged has the right to contest the taking of notice. Further, the Coast Guard rules for taking notice (§1.07-55(e)) are based upon Rule 207 of the Federal Rules of Evidence and provide protections equal to or greater than those which are applicable in federal court.

(2) To the statement that in court there is an assumption that a person is innocent until proven guilty but that in Coast Guard hearings it is "up to you to prove that you didn't" commit the offense: §1.07-65 of the regulations requires a Coast Guard Hearing Officer to dismiss any case in which the evidence presented fails to prove that the person committed the violation. The burden in proving the case is on the agency, rather than being upon the individual to prove innocence.

I do not agree with the comparison of the Coast Guard to a police department. First of all, the Coast Guard is an agency with a proud tradition of activity in the fields of search and rescue, and protection of life and property at sea. Instead of being the Coast Guard's primary function, the civil penalty programs are merely one small addition to our multimission purpose. Thus, our purpose is not merely that of a police department. In addition, since this is only one small area of responsibility for district commanders and for the Commandant, they are in a far different and more detached position from that of police officials. More importantly, the "cozy relationship" to which the author refers does not exist. We have taken great pains in the regulations and in practice, to ensure that the Hearing Officer is completely independent of improper influence from personnel having responsibility for management of the programs generating the regulations which were violated. Our Hearing Officers are selected on the basis of experience, expertise, and maturity of judgment, and they may be either civilian or military. They are specially trained for the function. The Hearing Officer is solely responsible for the decisions he makes and the regulations require that these be made on the basis of the evidence before him. I am confident that our Hearing Officers are indeed following the letter and spirit of the regulations that require them to act fairly and impartially. Although thousands of cases pass before these Hearing Officers, I have had no complaints or other indications that there is any basis for concern about the Hearing Officers' impartiality. Similarly, each appeal to the Commandant is carefully reviewed by independent attorneys in the Office of the Chief Counsel and the police analogy is not an appropriate description of the appeal process.

Turning away from the article, I would like to emphasize the positive nature of the regulations. They have been developed to provide sufficient flexibility for dealing with cases of small boaters facing possible \$5 and \$10 penalties for minor discrepancies, and with cases of major corporations charged with serious violations of pollution prevention and merchant marine safety regulations. Thus, there are options so that a person may either have a case resolved informally and inexpensively, or in a more formal manner. Regardless of the financial size of the alleged violator or the severity of the offense, there are substantial procedural safeguards. We believe that these more than satisfy the requirements of due process and fairness. At the same time, we also believe that the regulations comply with or exceed virtually all of the recommendations of the Comptroller General in his May 15, 1978, Report to the Congress of the United States, "Administrative Law Process: Better Management Is Needed,"

and of the recent action of the Administrative Conference of the United States on "Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies."

In summary, the Coast Guard is unable to implement the suggestions for de novo trials in federal court because this is a matter fixed by the legislature and judiciary. However, I am firmly convinced that the regulations provide a fair, flexible, and efficient means for assessing penalties under a variety of different statutes. These regulations have been working well in practice and I expect that they will continue to do so in the future. I trust that this has been responsive to your inquiry. Thank you for your interest in the Coast Guard's enforcement programs.

BOARDING AND SEARCHING OF FOREIGN PUBLIC VESSELS

[You] sought advice concerning the right of the United States to board and search foreign public vessels in the navigable waters of the United States. Of particular concern in this regard, is the authority with respect to public vessels engaged in research, or warships. In addition, clarification was sought concerning the effect of United States non-recognition of the flag state of the foreign public vessel upon United States jurisdiction over the vessel while in the navigable waters of the United States.

Initially it should be noted that for this purpose, a "public vessel" is a vessel owned or operated by a sovereign which, at the time, is used for a public purpose, not in trade or commerce. Treaties currently in force grant rights to foreign public vessels (including warships) to exercise a right of innocent passage through the Territorial Sea and to enter the internal waters of the United States.

The treaties also require the foreign vessels in innocent passage to refrain from activities prejudicial to the peace, good order or security of the coastal state, and to comply with navigational safety, and port regulations of the coastal state if proceeding to internal waters.

Enforcement authority is severely limited over a foreign public vessel or warship which does not meet its obligation of compliance, or engages in passage which is not innocent. Under normal circumstances, amounting to a rule without exception, a coastal state may not assert its jurisdiction over a foreign public vessel or warship by boarding or searching it. Absent special agreement, such foreign vessel by virtue of its public character is subject only to the

jurisdiction of the sovereign whose flag the vessel flies.

It is accepted practice in international law that states may at their discretion exclude foreign warships from access to ports or establish special conditions regulating their entry, such as advance notification. Public vessels other than warships can claim no greater access privilege than is accorded to merchant vessels and may, additionally, be subjected to the more stringent entry control exercised over warships. United States practice in this regard has been to assimilate a public vessel on non-commercial service to the status of warships for purposes of entry into internal waters. It thus follows that absent contrary agreement, a right of refusal may be invoked against entry of these vessels into U.S. internal waters.

Absent a specific mandate, Coast Guard enforcement authority against these vessels does not extend to boardings or searches. In the event foreign public vessels in the internal waters of the United States fail to comply with regulations governing the conditions of entry to those waters, the foreign vessel may be required to leave and all steps necessary to enforce the expulsion would be permissible. The same right of expulsion exists if a foreign public vessel (including a warship) transits the Territorial Sea in a non-innocent fashion.

The treatment of foreign public vessels emanates from the Sovereign and not from the fact that another state has formally recognized the vessel's flag state. It may be possible to close United States ports against vessels of a non-recognized state; absent such closure the merchant vessels of such a state are present in internal waters in the same manner as similar vessels of a recognized state. The public vessels of such a state are entitled to all rights of innocent passage and subject to the same duties and sanctions as like vessels of a recognized state. Warships and other public vessels on non-commercial service are, of course, subject to such limitations on access as the coastal state shall in its discretion impose on such vessels.

G-LMI Memo 3172 of 31 July 1979

CIVIL PENALTY UNDER 46 U.S.C. 404 VICE 390C

[You] forwarded an appeal from the assessment of a civil penalty against [the vessel] for carrying more than six passengers for hire without a certificate of inspection or meeting appropriate manning requirements. It was correctly noted that the vessel was not subject to a charge under 46

U.S.C. 390c since the vessel exceeded the size limitations of 46 U.S.C. 390(b). While bringing the charge under 46 U.S.C. 390c did not prejudice the owners of [the vessel] when the statutory basis for the penalty action is changed to 46 U.S.C. 404, several statements evidence certain misapprehensions which should be corrected.

[You stated] that the charge under 46 U.S.C. 390c, as written against [the vessel] is a proper charge under 46 U.S.C. 404 as well. This is incorrect. The Small Passenger Carrying Vessel Act is not applicable to the vessel by virtue of the definition of passenger carrying vessel in 46 U.S.C. 390(b). That definition is applicable to 46 U.S.C. 390c but has no application to section 404. Section 390 et seq. and section 404 cannot apply to the same vessel. The question which often emerges in a charge under 46 U.S.C. 390 et seq., in connection with the determination of whether persons on board are "passengers," is whether consideration has been paid, per 46 U.S.C. 390(a)(5). In a 46 U.S.C. 404 charge the issue revolves around the "passenger for hire" language which is resolved by application of the regulatory definition, 46 CFR 70.10-3.

Some of the confusion with respect to section 390c stems from the reference to "sections 390-390g, 404, and 526f." This phrase appears in, among others, sections 390, 390a, 390b, 390c, and 390d of the U.S. Code provisions. The U.S. Code editors used this phrase in place of the phrase "of this Act" in the statute as enacted. It is the position of the Coast Guard, founded on the legislative history of the statute, that the editors erred in their interpretation. The phrase "this Act" in the correct context, refers only to sections 390-390d, or sections 1 through 5 of the Act of May 10, 1965, c. 258, 70 Stat. 151 et seq.

Section 390d of Title 46 is inapplicable to the [vessel] in the instant case due to the vessel's size. It therefore follows that the \$1,000 penalty provided for in section 390d cannot be imposed. Instead, a penalty of \$500 for each violation of section 404 is appropriate under the authority of 46 U.S.C. 497. Thus the two section 404 violations in the present case justify a total penalty of \$1,000.

The case file indicates that forfeiture action was contemplated under 46 U.S.C. 103 and 325 and that the civil penalty provisions of 46 U.S.C. 108 (relating to violations of 46 U.S.C. 107) were applied to this case. These four sections deal with matters which, immediately prior to the enactment of the Department of Transportation Act, were charged to the administration of the Commissioner of Customs

in the Treasury Department. A short time prior to the effective date of the transfer of the Coast Guard from the Treasury Department to the Department of Transportation pursuant to that act the Secretary of the Treasury transferred certain functions from the Commissioner of Customs to the Commandant, U.S. Coast Guard. Treasury Department Order No 167-81, 32 F.R. 2463, 30 January 1967. The provisions of Title 46 U.S. Code relating to this transfer are listed at 32 F.R. 7408, 18 May 1967. Of the four sections of Title 46 U.S. Code referred to above only 46 U.S.C. 103 and 325 are so listed (the former relates entirely and the latter in part to the transferred functions). However, there has been no transfer of the administration of 46 U.S.C. 107 and 108 to the Coast Guard. Consequently, in a case to which 46 U.S.C. 103 or 325 applies, this agency is without authority to undertake civil penalty action under 46 U.S.C. 108 for violations of 46 U.S.C. 107. Where a violation of 46 U.S.C. 107 is discovered in the course of a Coast Guard investigation, the matter should be referred to the Treasury Department for possible action under 46 U.S.C. 108. See [386 LB 20].

G-LMI ltr 16781/3 of 31 July 1979 to CCGD3

DEMISE CHARTER/MANNING REQUIREMENTS UNDER TITLE 46

The appeal is from the action of the District Commander in assessing a civil penalty [against a charter company] for violations of the Federal vessel documentation, inspection and manning laws, as follow:

a. Section 390c of Title 46, United States Code, operating a vessel carrying more than 6 passengers without a certificate of inspection;

b. Section 404 of Title 46, United States Code, operating a vessel carrying passengers for hire without meeting the applicable manning requirements of title 52 of the Revised Statutes.

The violations were found to have occurred on or about 25 May 1977 when the [vessel] was operated with [an employee of the charter company] in command in the vicinity of New York harbor while carrying approximately 50 persons, in accordance with an agreement with [another corporation].

On appeal you contend that the [vessel] in fact was operating under a demise charter and therefore was not subject to the laws cited above. Your appeal is denied except as stated below.

Initially, it should be noted that [the charter company] was charged with a violation of 46 U.S.C. 390c which is applicable only to passenger-carrying vessels as defined in 46 U.S.C. 390b. [The vessel] is not subject to 46 U.S.C. 390c by virtue of her length and displacement. Therefore, the charge should properly have been for a violation of 46 U.S.C. 404 which is applicable to a vessel of [the vessel's] size. However, the elements of proof establishing a violation of 46 U.S.C. 404, i.e., that a "passenger for hire" situation existed which necessitated the inspection of the [vessel], were clearly before and contested by [the charter company]. Furthermore, [the charter company] did defend against one charge under 46 U.S.C. 404, the noncompliance with manning standards. Therefore, [the charter company] was not substantively prejudiced by this administrative error. The penalty assessed under 46 U.S.C. 390d was inappropriate however, as 46 U.S.C. 404 carries a penalty of \$500 by virtue of 46 U.S.C. 497.

Section 404 of Title 46 U.S. Code requires that all vessels in excess of 65 feet in length and above 15 gross tons carrying passengers for hire (subject to certain exceptions not relevant here) shall comply with the applicable provisions of Title 52 of the Revised Statutes in regard to inspection and manning of such vessels.

"Carrying passengers for hire" is defined by regulation as carrying for valuable consideration whether directly or indirectly flowing to the owner, etc. See 46 CFR 70.10-3. A "passenger," for purposes of section 404 is defined at 46 CFR 70.10-35.

Substantial evidence appears in the record to support the finding of the Commander, Third Coast Guard District, that valuable consideration flowed to [the charter company] although indirectly through [a] broker, for the carriage of approximately 50 persons under agreement on or about 25 May 1977. [The charter company] has taken the position that it is not liable for any violation of 46 U.S.C. 404 on the grounds that an effective demise charter operated to install [the other corporation] as the owner pro hac vice of [the vessel]. It is agreed that the existence of true demise would strongly evidence that the ownership for the duration of the charter had been effectively transferred to [the other corporation]. Unless contravened by the associated conduct of the parties, such an agreement would have demonstrated that [the charter company] was not carrying "passengers for hire" in this case.

[The charter company's] argument is not well taken. The

thrust of the numerous court opinions in this area recognize that no single factor is necessarily conclusive in determining the existence of a true demise. The opinions are also quite uniform in placing the greatest emphasis on the determination of the party who exercises control and navigational authority over a vessel in deciding whether a demise exists. Similarly, the Coast Guard, when determining whether 46 U.S.C. 404 applies in a given case, evaluates all circumstances surrounding a charter transaction, inter alia, the written agreement (if any), conduct of the parties, allocation of liability, and manning of the vessel. See generally Guzman v. Pichirilo, 369 U.S. 698 (1972); U.S. v. Shea, 152 U.S. 178 (1894); Reed v. U.S., 78 U.S. 591 (Wall. 1871); Hansen v. E.I. Dupont DeNemours & Co., 33 F.2d 94 (2d Cir. 1922) cert. denied 280 U.S. 589; The R. Lenahan, Jr., 43 F.2d 959 (W.D.N.Y. 1930).

In reviewing the following case it is clear that you agree with the Hearing Officer that a bareboat charter was not created by the written agreement. See your letter of 12 July 1978. If the written agreement was not a bareboat charter, the implication is that it constituted a passenger for hire agreement. The conduct of the parties thus must determine whether the incidents of ownership in this case passed from [the charter company] to [the other corporation]. The record is replete with evidence of the parties' conduct. [The other corporation] realized that its navigational control of the vessel was limited and that access by its guests was subject to the approval of [the charter company]. [The other corporation] also caused the written agreement to be reviewed by skilled people to insure it met their requirements. Acceptance of the limitation on navigational responsibilities, and the allocation of liability for the vessel to [the charter company] clearly demonstrate that the agreement as written reflected the sort of agreement [the other corporation] desired. [The charter company's] conduct is also illuminating. [The charter company] maintained its own representative aboard the vessel with responsibility for the navigational safety and operation of the vessel as Captain. Further, the record, including your statement, gives no indication that [the other corporation] ever had the opportunity to engage a Master other than the owner's representative.

The evidence of record, both of the agreement and the intent of the parties as manifest by their conduct support the conclusion of the Hearing Officer that [the vessel] was not under the full command, control, and navigation of [the other corporation] and that no demise charter existed between [the charter company] and [the other corporation]. A penalty of

\$500 under 46 U.S.C. 497 for carrying passengers for hire without inspection as required by 46 U.S.C. 404 is therefore appropriate.

The authority of 46 U.S.C. 497 also supports the assessment by the district commander of a \$500 penalty for violation of the manning requirements of 46 U.S.C. 404. The [vessel], as established by the evidence, was carrying passengers for hire at the time of the accrual of the penalties. As such, she was subject to the manning requirements of Title 52's Revised Statutes. Since each violation of section 404 carries a \$500 penalty, a total penalty of \$1,000 is upheld.

G-LMI ltr 16781/3 of 31 July 1979

CHANGE IN PFD NOMENCLATURE

The continued use of the term Personal Flotation Device (PFD) has been questioned and the suggestion has been made that we use the term "Life Preserver" in lieu of PFD.

There are two basic reasons for objecting to this change. First, the terms "PFD" and "life preserver" are used extensively throughout the applicable regulations. See, e.g., 46 CFR Parts 25, 33, 35, 75, 78, 94, 97, 108, 109, 160, 167, 180, 185, 192, 196, and 33 CFR Parts 144, 149 and 175. Obviously, any change in the terms would necessitate a massive regulatory re-write and could cause considerable confusion to the public. Second, the terms are not as synonymous as some might believe. The term "PFD" is considerably broader than "life preserver," which has come to be equated with "life jacket." The regulations which set forth the specifications for lifesaving equipment (46 CFR Part 160) specify standards for three types of life preservers, all of which are life jackets. Other devices such as ring life buoys, buoyant cushions, buoyant vests and work vests are "PFD's" but are not "life preservers." This distinction stems in part from the statutory use of the term "life preserver" where it is used conjunctively with other devices, i.e., life preserver or life belt, ring buoy or other device prescribed by regulation. See, 46 U.S.C. 526e. There is currently a hierarchy of devices established by regulation. The broadest group is that of Lifesaving Devices or Equipment. Included as a subgroup are Personal Flotation Devices of which there are five types. A type I PFD is, by regulation, a "life preserver" and is also a "life jacket" within the meaning of the SOLAS Conventions.

G-LMI Memo 16752 of 10 August 1979

COAST GUARD RESPONSIBILITY FOR PORT AREA FIREFIGHTING

The Coast Guard has no direct statutory obligation to provide fire protection in port areas. Discretionary authority is granted by 14 U.S.C. 88 to take any actions to protect persons and property at any time and place where Coast Guard resources are available and can be effectively utilized. Section 6 of the Ports and Waterways Safety Act, as amended in 1978, 33 U.S.C. 1225, provides authority to prescribe safety equipment requirements for the prevention of damage or destruction, by casualties including fire, to structures on or in the navigable waters of the United States or on immediately adjacent shore areas. This Act expressly allows state or local governments to prescribe higher safety requirements or standards. The remaining grant of firefighting authority is limited in scope to reciprocal agreements between agency heads responsible for protection of United States property and local fire organizations, for mutual protection of property.

The Coast Guard has not assumed primary firefighting responsibility in port areas, but provides assistance to local authorities to the extent Coast Guard resources are available, pursuant to 14 U.S.C. 141. This secondary role is the result of a view that firefighting is a local responsibility and of budgetary and financial limitations. A secondary consideration is that the Coast Guard lacks sufficient equipment, personnel, and expertise. An additional factor that warrants consideration is the exposure to legal liability that would result from assumption of a primary firefighting duty.

The issue of Coast Guard responsibility for fire protection in port areas is more complex than the current statutory scheme would indicate. Local port authorities have pressed for an increased Coast Guard role. On 10 July 1978 the Committee on Merchant Marine and Fisheries reported on H.R. 2994 to the House of Representatives, which would provide grants to local authorities for the funding of port safety services. This bill is still under consideration by the House Committee on Public Works and Transportation. The Coast Guard has opposed this bill before the Subcommittee on Coast Guard and Navigation. Previous proposals in Congress (S. 2916 and H.R. 11459) would have established a national marine firefighting program, in which the Coast Guard would coordinate and control the activities of regional firefighting units. These proposals were opposed by the Coast Guard and were not reported on by the committees involved.

The primary federal involvement in fire protection is contained in the Federal Prevention and Control Act of 1974 (P.L. 93-498), as amended. Under this authority, the United

States Fire Administration of the Federal Emergency Management Agency directs the activities of the National Academy for Fire Prevention and Control. These activities include the training of personnel from any firefighting agency. The Act also provides for a data collection center, research and development programs, and direct technical assistance to local and state agencies in the areas of training and procedures. More importantly, the Act states that firefighting is, and should remain, a state and local function.

G-LMI Memo of 20 August 1979 to G-CV

MANNING OF MOBILE OFFSHORE DRILLING UNITS (MODUs)

[A question was raised as to] the authority for certain personnel requirements of the MODU regulations published 4 December 1978. Specially mentioned are sections 109.107 (master or person in charge), 109.203 (sanitation engineer) and 109.323 (lifeboatman, AB, or licensed engineer), with respect to non-self-propelled bottom bearing units. Three specific questions highlight the ever present confusion that is part of the Coast Guard regulatory and inspection program for MODUs. The questions are:

- a. What is the "vessel" status of the MODU in its floating and bottom bearing modes?
- b. What is the legal position of the "master" or "person in charge" and the "engineer in charge?"
- c. What is the legality of these manning requirements?

Paragraphs 2 - 7 state my conclusions on these and related issues and the remaining paragraphs discuss the rationale behind these conclusions.

When being towed to location, the bottom bearing, non-self-propelled units over 100 gross tons are seagoing barges and subject to the Seagoing Barge Act, 46 U.S.C. 395 et seq. The crew complement is prescribed pursuant to 46 U.S.C. 222.

When the MODU is on station on the U.S. outer continental shelf, and bottom bearing, it is no longer in navigation and the crew complement cannot be required pursuant to 46 U.S.C. 222. As a contrivance capable of being used as a means of transportation on water, it is at least a vessel, but in any event, whether U.S. or foreign, it is subject to the Outer Continental Shelf Lands Act, as amended (OCSLA), 43 U.S.C. 1331 et seq.

Since the MODU, when on station and bottom bearing, is not in navigation, the owner is not required to maintain the certificate of inspection issued under the Seagoing Barge Act. Penalties for failure to hold a certificate of inspection only apply to the seagoing barge "navigated without such certificate." 46 U.S.C. 398. However, inspection under the OCSLA is authorized.

Authority to require persons on the MODU and to inspect it, when it is bottom bearing and not in navigation, is contained in the OCSLA. Sections 4(d), 21 and 30 provide ample authority to regulate all aspects of the design, construction, alteration and repair of the MODUs. Section 4(d) provides authority to regulate the operation of the MODUs, including crew requirements, so long as they are reasonable regulations with respect to safety equipment and other matters relating to promotion of safety of life and property. Thus, if to promote safety of life and property it is necessary to have a person who is in charge, an engineer in charge, or a person capable of managing lifeboats, regulations requiring these persons are authorized by section 4(d).

These persons cannot be required to hold a Coast Guard "master's" license, or "chief engineer's" license or Coast Guard certificate as a "lifeboatman", "AB", or "licensed deck officer." The Coast Guard could, however, establish qualifications for these persons, and then provide, for example, that a person who holds a Coast Guard "master's" license is deemed to meet the qualifications and entitled to serve as the person who is in charge. This same problem was encountered in the drafting of the deepwater port regulations, where separate qualifications were established rather than requiring Coast Guard licensed personnel (for which there was a similar lack of authority). See 33 CFR Part 150, subpart B.

When the MODU is no longer bottom bearing, it is in navigation, and once again must meet the requirements of the Seagoing Barge Act, both for inspection and crewing.

Since the OCSLA only applies to the U.S. outer continental shelf, the OCSLA regulations do not apply to MODUs operating on a foreign continental shelf. Further, MODUs on a foreign shelf, when bottom bearing, are not in navigation, and the Seagoing Barge Act does not apply. This is a void for which you may desire to seek legislation.

For the last 24 years, and probably longer, the Coast Guard has grappled with the question of how to regulate MODUs. Sometimes we have considered MODUs vessels, sometimes not. The authority under the 1953 OCSLA was limited to artificial islands and fixed structures. The "dual status" theory was

conceived in 1972 to allow for regulation of MODUs under both the 1953 OCSLA and the vessel inspection statutes. Since foreign flag MODUs, as vessels, were not subject to our vessel inspection laws, they would have to be regulated as artificial islands or fixed structures. But we wanted to preserve our regulation of U.S. MODUs under the vessel inspection laws. The dual status theory was reaffirmed as late as March 1978. I believe the comprehensive authority contained in the 1978 OCSLA Amendments allows us to take a fresh look at the issues. Putting aside the past morass of opinions and letters, this fresh look leads me to the conclusions stated earlier. The analysis follows:

a. A vessel is defined as every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. MODUs in both floating or bottom bearing modes are vessels since they are capable of being used as a means of transportation on water.

b. As vessels, MODUs are subject to inspection under the Seagoing Barge Act, if in navigation, 46 U.S.C. 398. Crew requirements under 46 U.S.C. 222 may be imposed if the vessel is being navigated. The MODU being towed is clearly in navigation. The MODU floating on station is in navigation. U.S. v. Monstad, 134 F.2d 986 (9th Cir. 1943). Under the principle stated in the Monstad case, the MODU which is bottom bearing is not in navigation because it does not rise and fall with the tide. The MODU when bottom bearing is therefore not required to hold a Seagoing Barge Act certificate of inspection, and is not required to maintain a specific crew complement under 46 U.S.C. 222.

c. The MODU when bottom bearing is nevertheless subject to the OCSLA, as amended in 1978. OCSLA fills the voids for those units operating on the U.S. outer continental shelf (See para 5). Those operating on a foreign shelf are not subject to OCSLA and for those units there is a void in authority (See para 7).

d. The dual status theory is no longer important. This theory was developed to allow for regulation of foreign flag MODUs operating on the U.S. outer continental shelf. If these MODUs were vessels, then the vessel inspection laws would not apply. If they were artificial islands or fixed structures, they could be regulated under the 1953 OCSLA. Thus, we said, while they may be vessels, when on station they are also artificial islands and fixed structures and therefore subject to the OCSLA. This theory was extended to U.S. flag MODUs to enable regulation of those less than 100 gross tons. Since

the 1978 OCSLA Amendments allow comprehensive regulation of "devices" (which includes vessels), the dual status theory is no longer critical.

e. MODUs when on station may be lighted as devices since the IMCO Subcommittee on Safety of Navigation has recommended that MODUs on station need not be lighted in accordance with the COLREGS. DE XVIII/5/8 (2 FEB 1978), and DE XIX/6 (23 Mar 1978). This is in accordance with the Coast Guard's current philosophy.

Based on the foregoing, I conclude that the proper legal approach to regulation of bottom bearing MODUs is as stated in paragraphs 2 - 7. My hope is that we can recognize these MODUs when in the bottom bearing mode for what they really are - vessels out of navigation, subject to the OCSLA. The authority for those on the U.S. outer continental shelf is comprehensive, and rather than resulting in a diminution of authority, this opinion merely requires a modification of our regulatory approach. The greatest effect is on our philosophy regarding U.S. flag MODUs operating on foreign shelves.

G-LMI Memo 16712 of 16 July 1979 to G-M

APPLICATION OF IMCO STOWAGE STANDARDS

Upon a finding that the Company had violated 49 CFR 172.101 (improper stowage of hazardous materials on board the company's vessel), your appeal from the Hearing Officer's decision was denied in my letter to you dated 23 April 1979.

You have sent me a copy of a letter to you, dated 17 May 1979, from the Director, Materials Transportation Bureau. You contend that the Director's letter supports your argument that, since [the vessel] was in compliance with IMCO regulations, it should not have been cited for a violation of U.S. hazardous material regulations.

The hazardous material involved in this case was 80% Manganese Ethylene Bisdithiocarbamate, which, for purposes of the U.S. regulations, is classified as "pesticide, water reactive". (This material is commonly known as "maneb".) Maneb may be stowed either on or under a vessel's deck under the IMCO Code requirements. The U.S. regulations, however, require that maneb be stowed under deck. The Director's letter indicates that the Materials Transportation Bureau is preparing an amendment to the DOT regulations which, if adopted, would authorize the use of IMCO stowage for maneb. Until this amendment is adopted, however, the current DOT regulatory standard governs the transportation of hazardous materials by

vessels and must be observed by vessels navigating in United States waters.

In a recent telephone conversation, you implied that there had been an official announcement in the Federal Register which stated that stowage in accordance with IMCO standards would be accepted in lieu of the DOT regulatory requirements after July 1977. I am unaware of any such announcement, and you have not forwarded any evidence to me to support this position. There are some exceptions to the regulations contained in 49 CFR Part 176, however, and perhaps you understood them to apply in this case. 49 CFR 176.5(b)(8) exempts from the regulations foreign vessels transiting the territorial sea of the United States which do not enter the internal waters of the United States, if all hazardous materials being carried on board are being carried in accordance with the requirements of the IMCO Code. This exception did not apply in the instant case because [the vessel] was found in violation when she was moored at the Port of Long Beach, California -- which is clearly "internal waters of the United States." The second exception is found at 49 CFR 167.11. This exception applies to hazardous material "imported into", "exported from", or "passing through" the United States. Such material may be transported by vessel if it is "packaged, marked, labeled, classed, described, certified, and placarded in accordance with the requirements of the IMCO Code..." Nevertheless, 49 CFR 176.11 requires that such hazardous material must be "otherwise stowed and carried in accordance with Part 176." (Emphasis added.) It is undisputed that the maneb on board was not stowed as required by 49 CFR Part 176. (See 49 CFR 176.3 which, among other things, requires compliance with the stowage requirements of 49 CFR Part 172.)

Your letter also states that you had obtained a Coast Guard exemption, valid until 1 July 1977, to stow your vessels according to IMCO regulations. After that date no exemptions were granted and you "understood, therefore, that DOT and IMCO regulations were basically compatible." There is no question but that the requirements are compatible. Compliance with 49 CFR Parts 172 and 176 will satisfy the requirements of the IMCO standard. Unfortunately, your understanding of the interrelationship between these regulations, with specific regard to stowage, was mistaken.

G-LMI ltr 16460/11 of 12 September 1979

DEFINITION OF "PRODUCT CARRIER" IN RELATION TO SUBSECTION
(7) OF R.S. 4417a, THE TANK VESSEL ACT, AS AMENDED (TVA)

Subparagraphs (7)(B), (C), (G), (H), and (I) [of the TVA] do not apply to product carriers carrying non-petroleum oils or

petrochemicals. However, if at any time these tankers carry petroleum oils as cargo or in residue, subparagraphs (7)(A)-(I) would apply. On the other hand, subsection (6) TVA authority is not limited to tank vessels carrying only petroleum oils - it applies to tank vessels carrying the broad range of oils meeting the definition of oil in subparagraph (2)(E) of the TVA.

My opinion is not based on an interpretation of the definition of "oil." Rather, it is based on an interpretation of the definition of "product carrier." This latter phrase is defined as a tanker carrying oil other than crude oil. Subparagraph (2)(O) TVA. Read literally, this would include tankers carrying non-petroleum oils, because of the definition of "oil" in subparagraph (3)(E). Reference to the legislative history thus is required.

The Supreme Court has stated that it is proper to look to the legislative history to ascertain the true intent of Congress even when the statute is clear and unambiguous on its face.

"As we have noted before; When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 66, 96 S. Ct. 1938, 1942 (1976).

In this case, the Court approved the EPA's looking to the legislative history of the FWPCA to ascertain the true meaning of the words "radioactive materials" in the definition of pollutant. The EPA's regulation excluded radioactive materials which were encompassed in the definition of source, by product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended. This exclusion was contrary to the express statutory language, but consistent with the legislative history. The philosophy espoused by the Supreme Court allows us to look to the legislative history of the TVA to ascertain the true meaning of the definition of "product carrier."

The legislative history of the TVA amendment is replete with references to consistency with the protocols adopted at the 1978 Tanker Safety and Pollution Prevention (TSPP) conference. "Consistency" is used in the sense of "the same as." Where differences exist between the protocols and the TVA amendments, they are identified.

The development of the TVA amendments is revealing. On 26 May 1977, the Senate passed S.682, the original version of P.L. 95-474. The definitions applicable to the proposed amendments to the TVA did not include "tanker," "crude oil tanker," "product carrier," "major conversion," "new," "existing," or "crude oil." There was a "minimum standards" section markedly different from that enacted as law. The phrases "crude oil tanker" and "product carrier" were not used in the minimum standards section.

The House did not consider S.682 until after the results of the 1978 TSPP Conference were known. With the results in mind, the House Coast Guard Subcommittee rewrote S.682. The definitions contained in the MARPOL Protocol adopted at the Conference were inserted in subparagraphs (2)(M)-(5) of the TVA. The minimum standards section was altered to adopt the standards contained in the MARPOL and SOLAS Protocols. Two variations were included in subparagraphs (7)(E) and (H). Otherwise, the Congressional intent is clear - the other paragraphs of subsection (7) relating to crude oil tankers and product carriers (paragraphs (A)-(D), (F), (G), and (I)) are, in essence, identical to the Protocols' provisions.

The House Merchant Marine and Fisheries Committee report on H.R. 13311 (the Committee substitute for S.682) leaves no doubt.

"...H.R. 13311 reflects, in part, certain requirements adopted internationally, as developed in the recent meeting of the International Conference on Tanker Safety and Pollution Prevention, held in London in February, 1978." Page 2 of H.Rept. 95-1384 (21 July 1978).

"In relation to tanker safety, the bill...requires the Secretary to prescribe, as a minimum, certain construction and equipment standards, including many that are identical to requirements adopted by the international community..." Page 10.

"In general, the minimum standards to be required are consistent with the internationally accepted standards." Page 21.

"To the extent feasible, the committee elected to endorse standards internationally agreed to." Page 21.

The inconsistencies are then identified.

"The subcommittee, and the committee thereafter, elected to take a middle ground and to place specific requirements on vessels between 20,000 and 40,000

deadweight tons which reach an age of 15 years by January 1, 1985, and thereafter. Such provisions as to existing crude oil tankers and existing product tankers of 20,000 deadweight tons or above, but less than 40,000 deadweight tons, are therefore not to be found in the results of the February international negotiations." Page 21.

"There are two other differences in the committee action and that of the international conference." Page 21. (The first concerns tankers transporting oil from a production facility on the U.S. outer continental shelf; the other relates to collision avoidance aids.)

There is no indication that "product carrier" was intended to have a meaning broader than that used in the TSPP Protocols.

Based on the foregoing, "product carrier" should be interpreted as it is used in the MARPOL and SOLAS Protocols. In those instruments, the requirements for segregated ballast tanks, dedicated clean ballast tanks and inert gas only apply to product carriers which carry petroleum oils, except petrochemicals. See MARPOL Protocol, Annex I, Regulation 1, paragraphs (1), (28), (29) and (30), and Regulation 13; and SOLAS Protocol, Chapter II-2, Regulations 55 and 60. Therefore, in accordance with the TVA's legislative history, "product carrier" as used in subsection (7)(B), (C), (G), (H) and (I) is limited to one carrying petroleum oils, except petrochemicals.

Note that subsection (6) and the other sections of the TVA are not limited in application to petroleum oils. These sections apply to tankers carrying the broad range of oils specified in the definition of oil in subparagraph (2)(E). Additionally, since subsection (7) is a "minimum standards" requirement, if it desires, the Coast Guard could, under subsection (6), require similar construction and equipment requirements on tank vessels carrying non-petroleum oils.

G-LMI memo 16710 of 19 July 1979 to G-M.

DOCUMENTATION OF FOREIGN BUILT DREDGING EQUIPMENT

With reference to your letter of September 1979, concerning the importation and use of foreign built dredging equipment, this will confirm your belief that the Act of May 28, 1906, C.2566, 34 Stat.204 (46 U.S.C. 292), does not apply to the use of dredging equipment other than on the navigable waters of the United States. There would thus be no requirement for a dredge used exclusively on waters which are not navigable waters of the United States, nor in the territorial sea nor

waters subject to exclusive jurisdiction of the United States, to be documented as a vessel of the United States.

It is suggested that your opinion should be further buttressed by communication with the agency directly concerned with regulation of domestic commerce by water, the U.S. Customs Service. Since you have specifically adverted to the act of "importing" the dredge, it is noted that the Service could also provide a statement on the act of importation.

G-LMI ltr 16211 of 4 October 1979.

PREEMPTION OF ALABAMA REGULATION CONCERNING KILL SWITCHES

The Coast Guard recently held that an Alabama regulation requiring emergency engine cut-off switches on boats was preempted under Section 10 of the FBSA. This holding raises a question regarding the scope of Federal preemption of state regulations pertaining to the carriage of associated equipment. This memorandum is intended to clarify some of the misunderstanding which seems to exist regarding the extent of Federal preemption.

There are, generally speaking, two jurisdictional bases for prescribing associated equipment requirements for boats. The first applies to boats and associated equipment used on waters subject to the jurisdiction of the United States. The second basis is somewhat broader and pertains to boats moving or intended to be moved in interstate commerce. The regulations which we have promulgated for federally prescribed equipment requirements fall readily into two categories, i.e., "operator carriage requirements" and "standards for manufacturers." The former affect the use of boats or associated equipment on the jurisdictional waters of the United State while the latter are broader in scope and have as their jurisdictional basis the interstate commerce connection. This being the case we may not regulate the use (carriage) of associated equipment on boats which are not operating on U.S. jurisdictional waters, i.e., boats operating on waters subject to the exclusive jurisdiction of a state. Since we may not regulate the use or carriage of associated equipment on these waters, it follows that we may not prohibit the state from regulating the use on waters subject to its exclusive jurisdiction.

In view of the foregoing, our preemption of the Alabama kill switch regulation is valid only to the extent that it applies to the jurisdictional waters of the United States. Alabama is still free to regulate the use and carriage of associated equipment on boats operating on waters over which it exercises

exclusive jurisdiction.

G-LMI Memo 16752 of 5 July 1979 to G-B

JOINT VENTURES; SUGGESTED RESPONSE TO QUESTION
PERTAINING THERETO

You have requested advice as to how a particular business relationship should be structured. Due to the fact that we have neither sufficient facts available nor the experience in all aspects of corporate law, we cannot advise you as to how your client's business should be organized. However, there are certain issues relating to the vessel documentation laws of the United States which are raised by the information you have forwarded.

The first issue is raised by the ambiguity of the letter's second sentence. If it was meant to indicate that the vessel has been purchased from a Canadian citizen, then the vessel may not be used in the coastwise trade. This is based upon the provisions of the act of July 2, 1935, chapter 355, which prohibits U.S. built vessels from being returned to the coastwise trade after a sale foreign.

If the vessel has not been owned by a Canadian then the issue becomes one of ownership. Since the vessel in question is to be used in the coastwise trade, ownership must be measured against the standards imposed by Section 2 of the Shipping Act of 1916, as amended. The provisions of 46 CFR §67.03-5(a), to which you have referred, are not wholly dispositive. Rather, that regulation is based upon R.S. 4132, as amended, which deals only with entitlement to obtain a registry. Therefore, you must refer to 46 CFR §67.03-5(a), and more importantly, the laws and cases underlying the regulations, to become familiar with even the basic requirements for engaging in the coastwise trade.

Although you have proposed five different arrangements for ownership of the vessel, you have stated that the true nature of the ownership relationship between the Canadian and the U.S. citizen will be that of a "joint venture arrangement." In the analysis of ownership questions, we are obliged to examine the substance of the arrangement rather than the form. Thus, attempts to have joint ventures characterized as something else have generally been unsuccessful. Furthermore, the penalty for such an attempt is forfeiture of the vessel. The case of Meacham Corp. v. U.S., 207 F.2d 535 (4th Cir. 1953) is illustrative of the nature of the inquiry which must be conducted in any case of this sort.

In conclusion, in cases in which the substance of the arrangement is, as you have described, that of a joint venture, the vessel will be unable to engage in the coastwise trade because of the involvement of the Canadian citizen as one of the partners. Any document which might be issued to the vessel would have to bear an endorsement restricting the vessel from engaging in the coastwise trade.

G-LMI Memo 16713 of 4 October 1979 to G-M

SHIP MORTGAGE RECORDING REQUIREMENTS

[The] question was whether a loan security agreement would have to be annexed to a recorded first preferred ship mortgage in order for the mortgage to be effective under the Act. The direct answer to your question is that there is no requirement for the security agreement to be attached in order for the mortgage to be preferred.

In order for a mortgage to have the preferred status given by the provisions of 46 U.S.C. 953, it must meet the requirements as laid out in 46 U.S.C. 922. Once these requirements are met and the mortgage is endorsed on the vessel documents the mortgage has preferred status. There is no requirement for the loan security agreement to be annexed to the instrument. Of course, the security agreement may be annexed, however, this will not affect the preferred status so long as the security agreement is not inconsistent with the mortgage. If the security agreement of any other documents are recorded then these instruments must be attached to each vessel's mortgage covered by a blanket mortgage. 46 CFR 67.49-7.

Briefly restated, the mortgage has preferred status upon meeting the requirements for recording, and while documents such as the loan security agreement may be annexed they are not required to be annexed.

G-LMI ltr of 8 July 1979

U.S. v. CHEVRON OIL CONSTRUED

The record indicates that no evidence was introduced at the hearing to contradict the evidence presented by appellant bearing on the issue of a harmful quantity of oil. [United States v. Chevron Oil Co., 583 F.2d 1357 (5th Cir. 1978)] holds that if expert evidence is introduced to rebut the presumption of a harmful quantity raised by the sheen test, the Government must meet the rebuttal with evidence that the spill in question was of a harmful quantity under the

circumstances. Before accepting a proposed witness as an expert, the Hearing Officer must determine, as a matter of record, that the witness is, in fact, an expert. Any questions as to the witness' qualifications must be made as a matter of record at the administrative hearing so that the issue may be properly addressed on appeal. However, once an expert witness rebuts the presumption, it is necessary to have evidence introduced to demonstrate that the spill was in a harmful quantity. Although the statement of [the expert] was accepted in this case, there was no further evidence submitted on the issue. Therefore, the assessment cannot be upheld. Such an addition to the record is necessary for a finding of a harmful quantity based on substantial evidence.

With paragraph 2 in mind, note that the critical provision of 33 U.S.C. 1321(b)(3) was amended in 1978 as follows: "quantities that may be harmful." The problem outlined in that paragraph will not arise in cases arising after 2 November 1978.

G-LMI ltr 16460/8 of 2 July 1979 to CGD8

USE OF EPA OIL SAMPLE ANALYSER IN FWPCA CIVIL PENALTY HEARING

The case is remanded for further proceedings as appropriate. Remand is necessary in view of the deficiencies in the evidence and in the procedures followed in handling the case.

Of primary concern is the inadequacy of the EPA's report of its oil sample analysis results as an evidentiary basis for the hearing finding that the oil was discharged by the [vessel]. The report is devoid of factual information as to the similarities and differences found among the various samples analyzed; it merely states conclusionally that the "total data indicate the source of the oil was the [vessel]" and that the spilled oil "unequivocally came from the [vessel]". It is the function of the Hearing Officer, not the EPA chemist, to evaluate the results of oil sample analysis and to form a conclusion, on the basis of that evaluation, as to whether the vessel or facility of the person charged was the discharger of the oil in each case. The function of the chemist is to furnish a thorough report of the similarities and differences found among the samples submitted for analysis. He would then be expected to state whether or not, in his opinion, the analysis establishes a "match" between the discharged oil and that from the suspected vessel or

facility. This statement would be evaluated by the Hearing Officer in conjunction with all other available relevant evidence in establishing the identity of the discharger. In this manner, the requisite evidentiary basis for the Hearing Officer's eventual penalty assessment action against the alleged discharger will make its way into the case record, and it will be possible to conduct a meaningful review of the case on appeal to ascertain whether the evidence supports the Hearing Officer's actions. As it presently stands, the record in this case does not measure up to these requirements. Not only are the relevant data on the characteristics of the various oil samples absent from the record, but the factual specifics which assertedly establish a "match" between the spilled oil and the samples from the [vessel] are lacking as well.

The foregoing deficiencies are especially serious in this case, in that while two samples were taken from the [vessel], the EPA's report does not even state which of the two--the one from the bilge or the one from the fuel line--matched up with the spilled oil in the river. This omission further detracts from whatever validity the EPA chemist's conclusional report might otherwise have. In such a posture the record cannot be said to contain substantial evidence supporting a finding that the spill originated from the [vessel], since one of two equally possible inferences which can be drawn is the apparently unexplainable conclusion that the vessel's bilges were the source of the 10,000 gallons of oil involved in the discharge incident.

As a further point related to the EPA oil sample analysis in this case, it is noted that the Hearing Officer's handwritten "case analysis" contains a statement that the "Commandant... always accepts the EPA analyses over private analysis and prefers to take the chance of overturning in court." This statement is wholly incorrect. In no way does it reflect, to any extent whatsoever, Coast Guard policy, past or present.

With regard to the matter of using oil sample analysis results as the basis for assigning liability for an FWPCA discharge violation, a further point should also be mentioned. That is, when oil sample analysis is the sole means available for obtaining direct evidence to establish a suspected discharger's FWPCA liability, it is not enough to subject the collected samples to only the gas chromatography and infrared spectroscopy methods of testing. In such instances, the samples must be submitted to the Central Oil Identification Laboratory for subjection to the four-analysis testing series.

It is noted that, except for the transmittal letter, the record contains no data pertaining to wind direction, tides, etc., on the river on the day preceding the date the violation assertedly occurred. This information was undoubtedly available, and would have aided significantly in reconstructing the oil's probable course from its source to the removal site.

G-LMI ltr 16400/5 of 30 July 1979 to CGD5

FWPCA CIVIL PENALTY HEARING OFFICER NOT BOUND BY
PRELIMINARY OPINIONS OF STAFF PREPARING A CASE

With regard to your objection to the findings of the Hearing Officer on the foreseeability of this discharge, you refer to the "Preliminary Assessment" worksheet. The comments on this worksheet indicated that it was the preparer's opinion that the discharge was "probably not" foreseeable by a prudent person. Nevertheless, the Hearing Officer found that both the Chief Mate and Chief Engineer were aware of leaking cargo valves on the vessel. The Hearing Officer concluded that "the vessel crew did not take the necessary steps to correct the known deficiencies that ultimately led to this pollution incident."

The Hearing Officer is not bound by the comments or opinions of anyone involved in the preliminary preparation of a civil penalty case. He exercises independent judgment in evaluating the facts and applying the law in each case. After reviewing the record of the instant case, I find that the Hearing Officer's decision is fully supported by substantial evidence. Furthermore, I find that the civil penalty of \$750 is neither inappropriate nor unreasonable under the circumstances of this case. Accordingly, the penalty is affirmed.

G-LMI ltr 16460/17 of 21 Sep 1979

FWPCA CIVIL PENALTY HEARING EVIDENTIARY VALUE OF
OIL SAMPLES USED

For the reasons stated below, the case has been dismissed.

The evidence contained in the case record is sufficient to permit the inference that the [vessel] may have been the source of the discharge observed by the investigator on 12 August 1977. The case record does not provide, however, the substantial evidence needed to support the assessment of a civil penalty against the vessel's owners.

The evidence upon which this case hinges is an oil sample

analysis "match". The analysis was performed by a Field Oil Identification Laboratory (FOIL). As indicated in reference (a), evidence of a sample match under a FOIL analysis is not conclusive by itself. Also, the record in subject case does not indicate whether all possible sources of the discharge were sampled, as required by reference (a). The Appellant claims that several other vessels were in the area at the time the discharge was discovered, but the record indicates that only one other vessel was sampled. If the investigator consciously excluded other potential sources from consideration, the record does not reflect the reasons why they were so excluded. (One source, [an oil] facility, was excluded when it was discovered that the facility did not handle the type of oil discharged. Nevertheless, the reason for this exclusion was not a part of the record made available to Appellant prior to the penalty assessment. It appears only in the Pollution Control Officer's recommendation to the Hearing Officer and in a memorandum included in the record after the appeal was filed. The use of these ex parte communications is contrary to United States v. Independent Bulk Transport, 394 F. Supp. 1319 (1975). The party charged in any civil penalty action has the right to see all the evidence presented to the Hearing Officer, and the Hearing Officer's decision must be based only on the evidence which was made available to the party charged.)

Another problem with the oil sample evidence in the subject case is the delay between the time the "water sample" was taken (12 August) and the time the matching "vessel sample" was taken (18 August). This delay detracts from whatever persuasive value the sample match might otherwise have had. Similarly, the evidence of oil on the deck of the [vessel] was discovered six days after the discharge itself was discovered. Absent further information showing that this evidence existed at the time of the discharge, it will not support the identification of the vessel as the discharge source. Lastly, the record does not indicate the relative positions of the suspected vessel, the spill, Pier 71, other vessels, etc. (I note the reference to "only 2 vessels at anchor in area" made in the Pollution Control Officer's recommendations. Independent Bulk Transport precludes the consideration of this information for the reason stated above.) In sum, the evidence in the record does not sufficiently buttress the sample analysis to form a "substantial evidence" basis which would support the penalty assessment.

G-LMI ltr 16460/13 of 12 September 1979

CONDITIONAL MITIGATION OF CIVIL PENALTIES NOT PROPER

A civil penalty was assessed in subject case. Respondent exercised an appeal of the assessment to the Commandant. Upon review the assessment was upheld at \$45, as conditionally mitigated.

By letter, dated 7 August 1978, respondent was informed that a civil penalty of \$90 was assessed in subject case. Respondent was also informed that this penalty was conditionally mitigated to \$45 if payment was made within 30 days. This device raises several problems, and its use should be discontinued. Such a method has a detrimental effect on the quality of and conviction behind a Hearing Officer's penalty assessment procedures. Legal problems are also involved, one being that the method may be labelled as arbitrary and capricious since there appears to be no definite pattern to its application. Use of conditional mitigation can also influence a party's desire to seek review of the penalty assessed since a party who chooses to appeal must pay the larger penalty if the appeal is unsuccessful.

To remedy this situation, it is Coast Guard policy to affirm appeals before us at the conditionally mitigated penalty amount. In the future the use of the conditional mitigation device should be discontinued.

G-LMI ltr 16781/17 lf 24 October 1979 to CGD 17

WITHHOLDING OF SEAMEN'S WAGES BY TERRITORY OF GUAM

An opinion [was requested] as to whether 46 U.S.C. 601 prohibits the Territory of Guam from withholding part of the wages of seamen engaged in the coastwise trade pursuant to the provisions of the tax laws in effect in the Territory of Guam.

In light of the language of the statute, the legislative history surrounding its enactment, and the applicable case law construing it, I am of the opinion that section 601 of Title 46 prohibits the Territory of Guam from withholding wages due or accruing to a master, officer, or any other seamen who is a member of the crew of a vessel engaged in the coastwise trade, under the Guam Territorial Income Tax.

46 U.S.C. 601, by its own terms, is applicable to the tax laws of any "State, Territory, possession, or Commonwealth, or a subdivision of any of them." The clear intent of Congress was to limit the administrative and financial burden

on both the employers of the protected class, and the protected classes themselves, who otherwise would be subjected to withholding schemes of as many jurisdictions as their vessels called at. In 1959, when Congress addressed the question, a number of the influential mercantile states, e.g. New York and Massachusetts, had enacted state regulations designed to require withholding of wages from seamen whose nexus to the state arose as a result of crewing a vessel which called at ports of that state. Congress responded to this trend by limiting the authority of the states to require such withholding of wages, pending a comprehensive review of the problems inherent in multiple withholding liabilities imposed on maritime interstate enterprises. 1959 U.S. Code Cong. & Adm. News 2530. The intent of Congress was not to prohibit imposition of state taxes in toto, but merely to prevent the withholding of wages due or accruing. *Id.* at 2532. See also Streckfus Steamers, Inc., v. City of St. Louis, 472 S.W. 2d 660, 683 (St. Louis C. of A. 1971), cert. denied, 409 U.S. 841 (1972); State of Alaska v. Petronia, 418 P.2d 755, 760 (Wash. 1966), appeal dismissed, 389 U.S. 7 (1967). Thus the constitutional propriety of imposition of an income tax by the Territory of Guam on the classes protected by 46 U.S.C. 601 turns on factors unrelated to the prohibition of a withholding requirement.

The prohibition in 46 U.S.C. 601 does not extend to the federal government. No need exists, given the unitary nature of the federal income tax structure to protect from multiple accounting requirements. The character of the Guam Territorial Income Tax is a bit unusual since it was enacted by Congress, but is administered and enforced wholly by the Government of Guam. 48 U.S.C. 1421i categorically states that the income tax laws in force in Guam, despite their peculiar origin, impose a "separate Territorial Income Tax...." further, the 1958 amendment to section 1421i provided that no substantive change was wrought by the new language but that it ratified the previous treatment. Pub. L. 85-688. The previous treatment referred to is memorialized in a pair of cases significant in light of the present discussion.

Laguna v. Ansell, 102 F.Supp. 919 (D.Guam 1952), aff'd, 212 F.2d 207 (9th Cir.) cert. denied 348 U.S. 830 (1954), held that the Organic Act of Guam (48 U.S.C. 1421i) imposed a territorial tax to be collected by the appropriate officials of the Government of Guam. Judge Shriver's opinion in Laguna as to the nature of the Guamanian Income Tax was cited with approval by Judge Byrne in Wilson v. Kennedy, 232 F.2d 153

(9th Cir. 1956). Subsequent to these opinions, in Public Law 85-688 Congress expressly approved the holdings by clarifying the language of 48 U.S.C. 1421i to reflect the precise language of these opinions. The validity of the holdings in correctly ascertaining the intent of Congress is thus beyond question. The main difficulty with resolving the issue presented in this memo by resort solely to these cases is the subsequent opinion of the Ninth Circuit in Bank Of America v. Chaco, 539 F.2d 1226 (9th Cir. 1976), which determined that the Guam territorial income tax was not a tax imposed by Guam for the purposes of 12 U.S.C. 548 (Pub. L. 91-156 subsequently altered §548 eliminating the language at issue in Bank of America).

12 U.S.C. 548 limited the power of a local government to tax a national bank. It allowed taxation, but once only, of the net income of a national bank. The Court in Bank of America did not hold that the Guam territorial income tax is not a tax imposed by Guam, but solely that the income tax was not a tax for the purposes of 12 U.S.C. 548. This conclusion was clearly proper since section 548, by its terms, applied only to taxes which the local government "may determine and direct." Since Guam does not "determine" the income tax, 12 U.S.C. 548 did not prevent imposition by Guam of a tax on national banks measured by a percentage of net profit for the privilege of doing business in Guam. Bank of America at 1228. See also Guam v. Koster, 362 F.2d 248 (9th Cir. 1966). (Guam may not establish general regulations inconsistent with the federal tax statutes.) The Bank of America court also specifically approved the holdings of the Laguna and Wilson cases, and limited its own holding, to the then existent language of 12 U.S.C. 548.

In summary then, the legislative history of 46 U.S.C. 601 indicates that Congress was concerned with protecting the income of certain classes from multiple withholding requirements pursuant to the tax laws of States, Territories, etc. Despite its unusual origin, the Guam Territorial Income Tax is the functional equivalent of an income tax imposed by one of the states or their subdivisions, and is the type of tax which the prohibition of 46 U.S.C. 601 was meant to cover. To allow mandatory withholding pursuant to the tax laws of Guam would violate both the clear language of the statute, and the accompanying legislative and judicial history. It would therefore be inappropriate for the Territory of Guam to attempt to impose withholding requirements with respect to the wages of seamen on vessels engaged in the coastwise trade to whom the provisions of 46 U.S.C. 601 extend.

G-LMI ltr 16200 of 30 July 1979

FWPCA CIVIL PENALTY-PRETRANSFER CONFERENCE-VESSEL
WAS NOT A CONDUIT

The Hearing Officer found that the [vessel's] Chief Engineer (person-in-charge of the oil transfer) failed to hold a pretransfer conference with the barge tankerman to agree upon transfer shutdown procedures. This constituted a violation of 33 CFR 156.120 (q)(12). The evidence in the record establishes that the Chief Engineer, upon realizing that the vessel's tank was about to overflow, tried unsuccessfully to get the tankerman to stop the barge's pumps. The Chief Engineer stated that he waved his arms and shouted to the tankerman, but that his message was not understood. The Chief Engineer's statement demonstrates clearly that, even if a pretransfer conference was held, shutdown procedures were not agreed upon. Thus, I find substantial evidence in the record to support the Hearing Officer's conclusion that 33 CFR 156.120 (q)(12) was violated.

You argue that the Hearing Officer erred in assessing a penalty, under 33 U.S.C. 1321(b)(6), against the owners of [the vessel] rather than against the barge owners. You contend that [the vessel] was merely a "conduit" for the oil discharge from the barge. Whether [the vessel] was a "conduit", or not, oil was in fact discharged from the vessel into the waters of the United States. Thus, under the absolute liability scheme of 33 U.S.C. 1321(b)(6), the owners of [the vessel] are liable to civil penalty action. The Hearing Officer, in what I believe to be a proper exercise of his discretion, determined that the purposes of the FWPCA would best be carried out by instituting civil penalty proceedings against [the vessel] owners. In view of the maximum penalty of \$5000 authorized by the statute, I find that the \$250 civil penalty assessed by the Hearing Officer indicates that he gave careful consideration to the extent of the vessel's "culpability" in his evaluation of the facts presented. I do not consider further mitigation warranted. Accordingly, the \$250 civil penalty assessed for the violation of 33 U.S.C. 1321(b)(3) is affirmed.

FWPCA CIVIL PENALTY-FINDING OF NO OVERT NEGLIGENCE
AND CONSIDERATION OF PRIOR PENALTIES ON
ABILITY TO REMAIN IN BUSINESS

The appeal is from the action of the Hearing Officer in assessing a penalty against the company under the authority of section 311 (b)(6) of the Federal Water Pollution Control

Act (FWPCA), 33 U.S.C. 1321 (b)(6). The assessment was based on the finding that, in violation of 33 U.S.C. 1321 (b)(3), a quantity of oil, estimated at 1260 gallons, was discharged from a facility into [the] Run, causing one or more of the conditions specified in 40 CFR 110.3(b). The discharge occurred when oil leaked from a rust hole in a section of [company] pipeline.

[The] appeal alleges that the cause of the spill at issue here was not foreseeable and, therefore, only a nominal penalty can be justifiably assessed. Concerning the discharge's degree of foreseeability, the evidence indicates that records dating back to 1929 cannot establish whether or not the section of pipeline involved in the discharge, originally installed in 1877, was ever replaced prior to the accident. Although such records cannot establish when a section of pipe will rust out, the records do serve to inform as to the possible age of that particular section of pipe line. Nevertheless, I note that, even in his preliminary evaluation of the case, the Hearing Officer indicated that he found no "overt" negligence. In the actual assessment, an even lesser penalty was assessed than originally proposed. Therefore, there is no basis for appealing from a finding of foreseeability since the penalty size was not based on such a finding. However, the mere fact that a spill was not found to be foreseeable does not lead to the conclusion that a penalty is not required. On the contrary, this issue has recently been decided contrary to your position. U.S. v. Marathon Pipeline Co, 12 ERC 1591 (7th Cir. 1978).

With regard to [the] argument that the Hearing Officer failed to consider the size of [the] business and the aggregate effect that this penalty, combined with all of [the Company's] other penalties, would have [on the Company's ability] to remain in business, I note that 33 U.S.C. 1321 (b)(6) requires that a civil penalty shall be assessed for each offense. The statute holds that "Each violation is a separate offense." Thus it is the intent of Congress that each violation should require a separate penalty to be assessed based on the particular circumstances of that discharge. To allow the assessment of one penalty to affect the penalty assessment in a subsequent violation would violate Congressional intent. Such a policy would negate the purposes served by the statute and provide a benefit to the most flagrant and repeated violators of the law. Therefore, the financial effect of past penalties is not considered as a factor requiring mitigation of future penalties for subsequent violations.

G-LMI ltr 16460/2 of 12 June 1979

RECORDABILITY OF SHIP MORTGAGES; ABSENCE OF AMOUNT
CERTAIN AND MATURITY DATE

An opinion [was requested] as to whether a document, purporting to be a "Preferred Mortgage of Vessel" is recordable under the Ship Mortgage Act, 1920, as amended.

Under the described arrangements [RMI] is indebted to a credit corporation, in the amount of \$600,000 under an equipment loan agreement dated 7 April 1978. [RMI] is also indebted in an indeterminate amount to [the credit corporation] under a loan and security agreement which involves a loan of \$651,000 plus additional advances. There is no stated maturity date in the description of the arrangements but it appears that the debts are essentially of a demand nature. [A] realty company is the sole owner of the [vessel] and a limited guarantor of all [RMI] obligations. As such, [the realty company] has executed the purported preferred mortgage of the vessel to [the credit corporation].

[It is argued] that the Coast Guard has no discretion in determining whether to record any submitted document... Whether a document is defective or not is solely a matter of concern to the parties to the mortgage and to any claimants against the vessel. In defense of this position Southland Financial Corp. v. Oil Screw MARY EVELYN, 248 F.Supp. 520 (E.D.La. 1965) [is cited] and, to a lesser extent, two cases relating to the use of state law in determining the validity of mortgages.

The pertinent portions of the Ship Mortgage Act, 1920, are located at 46 U.S.C. 921 and 922, which state in part:

§921(b) Such collector of customs shall record bills of sale, conveyances, and mortgages delivered to him in books to be kept for that purpose and indexed to show-

...

(5) The amount and date of maturity of the mortgage.

§922(c) These shall be indorsed upon the documents of a vessel covered by a preferred mortgage-

...

(3) The amount and date of maturity of the mortgage;

(d) Such indorsement shall be made ... and no clearance shall be issued to the vessel until such indorsement is made.

The first point to consider is [the] contention as to the validity of the mortgage not being a Coast Guard concern. To the extent that the ultimate enforceability is a question for the courts, [this] is correct. However, this should not be the area of Coast Guard inquiry in problems of this nature. Rather, the relevant questions for us to consider are those dealing with the requirements of recording and for obtaining an indorsement.

The first issue of substance is whether this mortgage is one to which the Ship Mortgage Act applies. The purpose of the Act was to provide a growth incentive for the merchant marine by affording greater security to holders of mortgages. The Oil Screw OLIVE L. MOORE, 379 F.Supp.1 1382 (W.D.Mich. 1973); The M/V MR. ED, 270 F.Supp. 830 (E.D.La. 1967); Gyory, Security at Sea: A Review of the Preferred Ship Mortgage, 31 Ford.L. Rev. 231 (1962). It does not appear that the intent of the legislature in enacting the Ship Mortgage Act was the improvement of security of mortgages given by guarantors of third party loans when the loans do not relate to maritime activities. While there are cases, such as the OLIVE L. MOORE, *supra*, which tend to indicate that the Act applies to "financing of shipowners" (at 1390), I am of the belief that the apparently non-maritime nature of this transaction does not raise a bar to recording. In facing a somewhat similar problem, the U.S. Supreme Court has held that the fact that loan proceeds are devoted to non-maritime uses does not render the Act inapplicable. The THOMAS BARLUM, 293 U.S. 31 (1934). Although that case did not deal with a guarantor's mortgage, I am of the opinion that the apparently non-maritime nature of this loan does not render the mortgage outside the scope of the Act. [The] argument that the Coast Guard must record every document tendered to it for that purpose is erroneous. As the recording agency, the Coast Guard is required to perform its indexing and indorsing functions. As the courts have noted, the recording and indexing are for the benefit of parties other than the mortgagee and "a failure to properly index is a violation of the duty of the recording officer..." The W.B. COLE, 59 F. 182 (6th Cir. 1893). Thus, there is no legal impediment to rejecting tendered documents which are drafted in such a way as to make it impossible to carry out the statutory indexing and indorsing duties. In this regard, I point out the familiar legal maxim that courts

will accept "practical and long-continued construction(s) of the executive department charged with the administration of (an) act," unless there are "persuasive and cogent reasons" to the contrary. U.S. v. Shreveport Grain and Elevator Co, 287 U.S. 77,84 (1932). On this particular issue, the Bureau of Customs has long held that a document which does not have an amount and a date of maturity may not be recorded. Bureau of Customs rulings 3-53112 of June 9, 1952, and 3-57182/3-37168 of September 18, 1952. See also Bureau of Customs Marine Circular No. 26, of December 15, 1942. In a different matter, we have also ruled that not all documents tendered for recording which purport to be preferred mortgages must be recorded. Therefore, there is a reasonable and persuasive basis for rejecting [the] argument that the Coast Guard must record everything presented to it.

In determining whether the document actually lacks an amount or date of maturity, such that recording must be denied, it is necessary to explain some prior decisions and opinions. The basic rule in dealing with recording is that persons seeking the benefits of the law must strictly comply with all its requirements. The "Mortgage Act outdoes the worst of the old-fashioned state chattel mortgage acts in its insistence on formalities of execution and in the detail of its recording mechanics." Bergen v. Davis, 287 F.Supp 52 (D.Conn. 1968). In requiring strict compliance with the terms of the law for other purposes, the Supreme Court has ruled that there is no room for the courts to grant exceptions from the technical details:

"But the words of the Statute seem to us too clear to be escaped. The mortgage is made preferred only upon compliance with all the conditions specified, one of which is endorsement,... We see no room for construction, and there is nothing for the courts to do but bow their heads and obey." The NORTHERN STAR, 271 U.S. 522, 566 (1926).

A fortiori then, the Coast Guard cannot waive the need for applicants to have supplied a document which comports with all the Act's requirements. Among these requirements are the amount and date requirements of 46 U.S.C. 921(b)(5) and 46 U.S.C. 922(c)(3), the importance of which has been judicially recognized. The S.S. BAY BELLE, 215 F.Supp. 72 (D.MD. 1963). In this case, the amount of the mortgage is clearly lacking. Although the sums of \$600,000 and \$651,000 are stated, the provisions for coverage of future advances result in there being no amount which would advise the recording officer and persons who are doing business with the vessel of the size of

its indebtedness. Furthermore, the provisions for unrestricted advances have the effect of changing the maturity date from one which was otherwise ascertainable to one which is not. In its Marine Circular No. 26, Customs ruled that, for the purpose of recording the date of maturity, a demand vessel mortgage has a definite maturity date which is the date of maturity. However, mortgages which provide for advances beyond the date of maturity have been held to be not entitled to recording for want of a definite date of maturity because the advances have the effect of acting as an extension of the date of maturity. See Bureau of Customs ruling of June 9, 1952, and September 18, 1952 supra. See also, Bureau of Customs ruling MA 211 131 K/102-2 of May 17, 1961.

In the case [of] The Oil Screw MARY EVELYN, supra, a federal district court dealing with private parties held that a collateral mortgage given to secure future advances produces a valid preferred mortgage. However, that case does not contradict the Customs rulings which have established the rules relating to demand mortgages. Rather, the case dealt with a document substantially different from the one in this case. In that case, the mortgage was payable on demand in the amount of \$25,000. Although the principal was to be loaned through advances made after recording, the mortgage on its face had a fixed date and amount from which the Collector of Customs was able to fulfill his indexing on notice of the terms of the arrangement and maximum debt. I also note in passing that the court apparently did not have the administrative interpretations before it for consideration and it did not rule on their validity.

In conclusion, it is my opinion that the proffered document may not be recorded. The Coast Guard has a duty not to accept preferred mortgage documents which cannot be properly indexed and which fail to provide a basis for a proper indorsement. In this case, the mortgage clearly does not have an amount. It is also reasonably clear, from the analysis of prior administrative rulings, that it does not have a recordable date of maturity. These factors are fatal to the mortgage's recordability.

G-LMI Memo 16713 of 21 June 1973 to G-M

FWPCA CIVIL PENALTY-THIRD PARTY NEGLIGENCE

The appeal is from the action of the Hearing Officer in assessing a penalty against the company under the authority of section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321(b)(6). The assessment was based on the finding that, in violation of 33 U.S.C. 3121(b)(3), a

quantity of oil was discharged from the vessel into [the] harbor,... causing one or more of the conditions specified in 40 CFR 110.3(b). The discharge occurred when the [vessel] grounded on a pile of rocks while maneuvering in [the] harbor.

Your appeal contends that [the vessel owner] cannot be liable for the violation of 33 U.S.C. 1321(b)(6) in question here as the discharge was "caused" by the actions of a third party, [the] harbor pilot. The FWPCA does not require that there be a causal connection between the actions of an owner or operator of a vessel and a discharge from that vessel before a civil penalty can be assessed under authority of 33 U.S.C. 1321(b)(a). Accordingly, the statute does not provide for assessing penalties against parties other than the owner, operator, or person in charge of the vessel or facility from which the discharge occurs. An allegation of third party responsibility is not a defense to the imposition of a civil penalty. Therefore, the actions of the third party, which your appeal alleges to have "caused" the discharge, cannot be found to have absolved the owner and operator of [the vessel] of its liability under this statute. However, third party actions may be considered in determining the gravity of the offense.

The Seventh Circuit considered similar issues in U.S. v. Tex-Tow, Inc., 12 E.R.C. 1593 (7th Cir. 1978). Tex-Tow contended, as does your appeal, that under 33 U.S.C. 1321(b)(6) a penalty cannot be imposed on a party that did not "cause" an oil spill. In Tex-Tow, a barge operated by Tex-Tow was being loaded with gasoline at a dock owned and operated by Mobil Oil Company. As the barge was loaded it sank deeper, eventually settling on an underwater piling that punctured the hull of the barge, causing a discharge. Tex-Tow was conceded not to be at fault. Nevertheless, the Court upheld the assessment of a penalty against Tex-Tow, noting that it was within Congress's power to impose the economic costs associated with oil pollution upon certain oil-related activities having the effect of making those activities the "cause" of a spill notwithstanding the intervening conduct of a third party. Congress has so acted with regard to 33 U.S.C. 1321(b)(6). The Court held that "although a third party may be responsible for the immediate act or omission which "caused" the spill, Tex-Tow was engaged in the activity or enterprise which "caused" the spill." Tex-Tow Inc., 12 E.R.C. 1595. Thus, [the vessel owner] is, as Tex-Tow was, engaged in an activity upon which Congress has decided to place the cost of pollution when an actual discharge occurs.

Your argument that 33 U.S.C. 1321(b)(6) and 33 U.S.C. 1321(f) should be construed as coterminous contains faulty interpretations of the two provisions. Each serves a separate

purpose, making them readily distinguishable from each other. 33 U.S.C. 1321(f) serves to place liability for oil discharge removal costs on the owner or operator of the discharging vessel or facility. Liability under this provision applies strictly, except in the case of four specific instances. 33 U.S.C. 1321(b)(6) serves to impose sanctions for the discharge of oil on the owners or operators of discharging vessels or facilities. Congress provided no exceptions to the assessment of a penalty under this latter provision. Failure to provide similar exceptions to liability under 1321(b)(6), as in 1321(f), clearly indicates Congressional intent that the exceptions to liability under subsection (f) are not applicable to the imposition of a civil penalty under paragraph (6) of subsection (b).

Your argument that the assessment of a civil penalty under 33 U.S.C. 1321(b)(6), without a causal connection between the discharge and the owner or operator of any vessel or facility, would violate the constitutional guarantee of due process is based on judicial suggestions contained in a footnote to U.S. v. Atlantic Richfield Co., 429 F. Supp. 830, 9 E.R.C. 1993 (E.C. Pa. 1977). The Court, in this case, said that there could be cases where such a civil penalty would violate due process if the penalty could not be rationally related to the deterrent purpose of §311(b)(6). Your appeal alleges that no deterrent purpose can be served in assessing a penalty on a party lacking any fault for the discharge in question. This claim again misconstrues the economic rationale behind §311(b)(6).

In U.S. v. Marathon Pipe Line Co., 12 E.R.C. 1591 (7th Cir. 1978) the court held that the assessment of a penalty under §311(b)(6) did not violate due process owing to the statute's strict liability provision. Marathon involved a pipeline rupture and an oil spill caused by a third party. Preliminarily, the Court noted the deference accorded Congress in the field of economic regulations, in that the Supreme Court has not invalidated an economic regulation since 1937. The Court stated that the strict liability was based on the economic rationale that certain activities should bear the cost of their operations (although a residual deterrent function was performed), and that the FWPCA reflects a Congressional intent that the industry which poses the threat of pollution should bear the costs of water pollution. Thus, the civil penalty assessed under §311(b)(6) is rationally related to the FWPCA's goal of achieving pollution free waters by placing the costs of such action on owners and operators of polluting facilities.

In the alternative, your appeal contends that the penalty as assessed by the Hearing Officer is excessive. The Court, in

Marathon Pipe Line, cited above, held that the Coast Guard is permitted to assess more than a nominal penalty, under 33 U.S.C. 1321(b)(6), against the owner or operator of a discharging facility where the discharge was caused by a third party. The Court reasoned that 1321(b)(6) is a strict liability statute which contemplates a substantial penalty even in the absence of fault. The case record indicates that the Hearing Officer, in assessing a penalty of \$1500 from a penalty of \$5000 preliminarily considered appropriate, considered the appropriateness of the penalty to the size of the business, the effect of the penalty on the company's ability to remain in business and the gravity of the violation as required by 33 U.S.C. 1321(b)(6). The gravity of the violation is affected by third party responsibility for the discharge, and the size of the discharge. Although the exact size of the spill is in dispute, the estimates, in any case, indicate that a substantial discharge occurred. Upon a full review of the evidence presented, I cannot find that the amount of the penalty assessed was excessive, unreasonable, or unlawfully found.

G-LMI ltr 16460/11 of 26 June 1979

MEMORANDUM OF UNDERSTANDING BETWEEN COAST GUARD AND EPA
CONCERNING THE ASSESSMENT OF CIVIL PENALTIES

The United States Environmental Protection Agency (EPA) and the United States Coast Guard (USCG) have determined that it is necessary to establish procedures pursuant to which decisions may be made:

- (1) Whether a discharge of a designated hazardous substance is excluded from the application of the civil penalty procedures prescribed by section 311(b)(6) of the Clean Water Act (CWA); and
- (2) Whether action will be taken under paragraph (A) or under paragraph (B) of section 311(b)(6) CWA to impose a penalty for the discharge of a designated hazardous substance not so excluded.

The EPA and the USCG agree that decisions as to whether a discharge of a designated hazardous substance is excluded from the application of section 311(b)(6) CWA will be made initially by the EPA in cases evidencing particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum. In all other cases the decision will be made initially by the agency providing the On Scene Coordinator to the discharge incident. When a decision is made

that a discharge is excluded, penalty action under section 311(b)(6) CWA will be withheld.

The EPA and the USCG agree that decisions as to whether action will be initiated to impose civil penalties under paragraph (B) of section 311(b)(6) CWA, will be made by the EPA. Cases involving USCG responses, which evidence particular potential violation gravity, i.e., meeting criteria set out in section III of this memorandum, will be transmitted to the EPA for its consideration. In all cases where EPA determines that it is appropriate to initiate civil penalty action under paragraph (B) of section 311(b)(6) CWA, the USCG will withhold the initiation of civil penalty action under paragraph (A) of section 311(b)(6) CWA.

This memorandum establishes policies, procedures, and guidelines concerning the responsibilities of the EPA and the USCG in carrying out the foregoing agreement.

The respective responsibilities of each agency specified in this memorandum may be delegated to their respective subordinates consistent with established procedures.

The EPA and the USCG will review the implementation of this memorandum at least one year from the effective date of 40 CFR part 117 or sooner if agreed to by both agencies, and will make any changes to the policy, procedures, and guidelines set forth herein which are agreed to by both agencies.

SECTION 1

GENERAL

The amendment of 2 November 1978 to section 311 CWA (Public Law 95-576) excluded certain discharges of hazardous substances from the application of section 311(b)(6) CWA. The discharges so excluded are: (a) discharges in compliance with a section 402 CWA permit, (b) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 CWA, and subject to a condition in such permit, and (c) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 CWA, which are caused by events occurring within the scope of relevant operating or treatment systems.

In addition, this amendment created two methods for penalizing discharges of hazardous substances. The first,

which already existed as section 311(b)(6) CWA prior to the amendment, authorizes the USCG to assess a civil penalty not to exceed \$5,000 for the discharge of oil or a designated hazardous substance (section 311(b)(6)). The second method, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal District Court for penalties not to exceed \$50,000 per spill of hazardous substance, unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed \$250,000 (section 311(b)(6)(B)).

The legislative history accompanying the amendment makes clear that Congress intended to create a dual option system for penalizing discharges of hazardous substances under section 311(b)(6) CWA. A discharger of a designated hazardous substance can be penalized under paragraph (A) or paragraph (B), but not both. The EPA and the USCG will continue to assess oil discharge penalties administratively under paragraph (A).

SECTION II

COORDINATION

When a spill of a designated hazardous substance occurs, the On Scene Coordinator (OSC) will prepare a factual report of the incident. At the minimum, the report will address those criteria set forth in section III, of this memorandum.

The OSC will submit this report within 60 days of the spill incident. The OSC will submit the report to the District Commander when he is a USCG OSC, and to the Regional Administrator, when he is an EPA OSC.

When the District Commander reviews the USCG OSC's report and determines that one or more of the criteria set forth in section III, below, is applicable to that case, the entire record of that case will be referred to the EPA Regional Administrator for review. In addition the District Commander will refer the entire record of:

(a) any other case involving a discharge of a designated hazardous substance from a point source subject to a section 402 permit or permit application, which, prior to or after the commencement of penalty action, the USCG determines is excluded from the application of section 311(b)(6) CWA; and

(b) any other case which, the District Commander

considers appropriate for possible application of section 311(b)(6)(B) CWA.

When the Regional Administrator receives a case, either from an EPA OSC or upon referral from the District Commander, he will determine:

- (a) whether the case is excluded from the application of section 311(b)(6) CWA, and, if not,
- (b) whether a civil penalty action under section 311(b)(6)(B) CWA will be initiated.

The Regional Administrator will make these determinations within 90 days of his receipt of referral documents and will notify the District Commander promptly of the determinations in cases which have been referred. If the Regional Administrator determines that an action under section 311(b)(6)(B) CWA will be initiated, the case will be prepared in the EPA Regional Office and forwarded to the Department of Justice (DOJ) in accordance with established EPA case referral procedures.

If the Regional Administrator determines that the discharge is not excluded from the application of section 311(b)(5) CWA and that paragraph (B) action is inappropriate, or if EPA Headquarters declines to refer a Regional case, EPA will return the case to the USCG for appropriate action under paragraph (A).

Upon request, each agency will make available to the other any or all cases, files, and records, including OSC reports and official determinations, regarding decisions concerning exclusions or the impositions of section 311(b)(6)(A) or (B) penalties. Where there is disagreement as to the disposition of a particular case, the District Commander and the Regional Administrator will consult to resolve the matter. If necessary, the matter will be submitted to the respective Agency headquarters for final resolution.

SECTION III

CRITERIA

The USCG and the EPA agree that if one or more of the following criteria exists, the District Commander will refer the case to the Regional Administrator in accordance with section II of this memorandum:

- a. any indication of misconduct or lack of reasonable care on the part of the owner, operator, or person in

charge with respect to the discharge or with respect to the failure on the part of the owner, operator, or person in charge to adhere to the guidance of the OSC regarding clean-up or any policies, procedures, guidelines, or regulations applicable to clean-up;

b. any discharge incident other than a threat for which payments are made or to be made from the section 311(k) fund pursuant to 33 CFR section 153.407, except where no discharger has been identified;

c. any indication of prior violations by the discharger of any provision of the CWA, or violations of provisions of the CWA other than section 311(b)(6) CWA occurring at the time of the discharge, such as violations of a section 402 permit;

d. any discharge incident (other than a threat) as defined in 40 CFR section 1510.5(1) which requires activation (by full or limited assembly, or by telephone) of the Regional Response Team as required by 40 CFR section 1510.34(d), as amended; and

e. any discharge involving human injury or evacuation, damage to plant or animal life, or contamination of water supply or underground aquifers.

Other referrals to the EPA may be made on a discretionary basis.

[Signed for the Coast Guard on 14 August 1979]

LEASING AND HIRING OF QUARTERS FOR BACHELOR PERSONNEL

1. May housing be leased, under the authority of 14 U.S.C. 475(a), for single or joint occupancy by bachelor personnel in certain pay grades who are currently receiving a basic allowance for quarters and are generally unable to obtain adequate housing?

2. May housing be leased, under the authority of 14 U.S.C. 475(d), for joint occupancy for personnel on sea duty where BAQ spaces are not suitable for full-time housing of unaccompanied personnel?

In answer to question 1., housing may be leased under 14 U.S.C. 475(a) for occupation as public quarters by bachelor personnel if there are not adequate housing facilities near

the Coast Guard installation at which they are stationed. This interpretation of congressional intent is demonstrated by the presence of the phrase "and their dependents, if any" in § 475(a). Thus the statute appears to provide authority for leasing quarters on behalf of military personnel without dependents.

In answer to question 2., § 475(d) does not appear to be authority for the leasing of permanent quarters for bachelor personnel on sea duty in the same way they may be leased for other bachelor personnel under § 475(a). Under § 475(d), quarters for bachelor personnel on sea duty may be "hired" only "at such times as they may be deprived of their quarters on board ship due to repairs or other conditions which may render them uninhabitable." Comptroller General rulings and legislative history on this language make apparent that this provision was intended to allow the "hiring" of quarters for these personnel only when they are temporarily displaced from their shipboard quarters because those quarters are literally unavailable for habitation for physical reasons, not upon an administrative determination that the shipboard quarters are permanently "unsuitable." Addressing their same language in the Navy's companion provision to § 475(d), 10 U.S.C. 7572, the Comptroller General has stated that this provision is applicable, "at the time [the vessel] is undergoing overhaul or repair . . . at which time the quarters aboard that vessel have been made uninhabitable for assignment to him." (48 Comp. Gen. 480, at 485: see also B-188489, Sept. 16, 1975; B-187222, May 6, 1977; B-188481, August 10, 1977; B-188481, June 13, 1978.) This interpretation of the applicability of the title 10 and title 14 provisions is supported in the legislative history of two statutes, 34 U.S.C. 915 and 14 U.S.C. 133a, from which 10 U.S.C. 7572 and 14 U.S.C. 475(d) were derived. Congress described the situation to which the language "uninhabitable" applied as when a vessel was being "overhauled" or was "undergoing repairs". (H.R. Rep. No. 2182, 77th Cong., 2d Sess. 1 (1942) and S. Rep. No. 610, 77th Cong., 1st Sess. 2 (1941)). The use of the word "hire" on § 475(d), as opposed to "lease" in § 475(a), also supports the interpretation that § 475(d) is intended to allow only the provision of temporary lodgings, not permanent quarters as under § 475(a). The Comptroller General has consistently used the term "hire" only for temporary situations, including the "hire" or temporary lodgings such as a motel room. (See 7 Comp. Gen. 348.) This interpretation of the limited applicability of § 475(d) is also consistent with the related provision of 37 U.S.C. 403(b), which addresses preclusion of BAQ to personnel to whom "adequate" quarters are assigned. In the context of 37 U.S.C. 403(b), the Comptroller General has found that shipboard quarters are as a matter of law

"adequate." (See 47 Comp. Gen. 527; 44 id. 105; 42 id. 65; 35 id. 10.) Since shipboard quarters are deemed "adequate" for the Coast Guard, it would be anomalous to assert that shipboard quarters are "uninhabitable" under 14 U.S.C. 475(d), but adequate under 37 U.S.C. 403(b).

Therefore, temporary lodging may be hired for personnel on sea duty when they are deprived of their berthing facilities because physical conditions render these berthing facilities uninhabitable. The following examples may be useful as a guide to the type of circumstances which may make the berthing facilities on a ship uninhabitable:

1. air conditioning or electricity cut off
2. water cut off
3. intolerable or nauseating stench
4. insect infestation
5. inadequate sewage disposal.

It should be noted that these provisions (14 U.S.C. 475(a)) do not authorize the leasing of housing for personnel on sea duty. However, unoccupied leased facilities which currently exceed Coast Guard needs and therefore can be spared may be used by personnel on sea duty.

G-LGL memo 11103 dtd 07 AUG 1979

EFFECT OF RECEIPT OF SEVERANCE PAY UPON RECEIPT OF RESERVE RETIRED PAY

A former regular Coast Guard officer, twice passed over for LCDR, desired to affiliate with the Coast Guard Reserve as a QM1. This former regular officer had received about \$30,000 in severance pay. It was asked whether the receipt of severance pay will have an effect upon his eligibility for Reserve retired pay after twenty years of combined active and inactive service.

Acceptance of a lump sum payment by an officer who was twice passed over for promotion will not have an effect upon the member's eligibility for a non-regular retirement. The member's entitlement to severance pay upon twice being passed over for LCDR is derived from 14 U.S.C. 286. That statute provides as follows:

The acceptance of a lump sum payment under this section does not deprive a person of any retirement benefits from the United States. However, there shall be deducted from each of his retirement payments so much thereof as is based on the service for which he has received payment under this section until the total amount deducted equals the amount of the lump sum payment.

What this means is that the member's right to a non-regular retirement under 10 U.S.C. 1331 will not be affected by his acceptance of severance pay, e.g. he may include his years of regular service in achieving the twenty years of service required by 10 U.S.C. 1331(a)(2).

Acceptance of a lump sum payment by an officer who was twice passed over for LCDR will however, have an effect upon his entitlement to the pay derived from a non-regular retirement. As noted earlier, 14 U.S.C. 286 specifies that a prorated portion of the members retired pay will be deducted until he has paid back all of the severance pay.

For example: Lt X spent 10 years as a regular officer, was twice passed over for LCDR and discharged. He accepted \$30,000 in severance pay. He then entered the Coast Guard Reserve as an enlisted man. At the end of ten years he retires. When he reaches age 60 he becomes entitled to \$600.00 per month retired pay. However, since he received severance pay for his ten years regular service, 14 U.S.C. 286 will operate to require a deduction of 10/20ths of his retired pay or \$300.00 per month. This deduction will continue until the \$30,000 severance pay will have been repaid and the member will then become entitled to this full retired paycheck.

To summarize, a person who is in the situation described will not have his eligibility for a non-regular retirement impaired by reason of his having accepted severance pay but he will find that his retired pay will be reduced until such time as the total amount of the severance pay has been repaid.

G-LGL memo 1440 dtd 17 Sep 79

RECOMPUTATION OF A MEMBER'S RETIRED PAY DUE TO INCREASED
PHYSICAL DISABILITY WHILE ON THE TEMPORARY
DISABILITY RETIRED LIST

The Chief Counsel was asked whether a member who has been placed on the Temporary Disability Retired List (TDRL) may

have his retired pay increased when his percentage of disability rises but he remains on the TDRL. Specifically, CAPT X was placed on the TDRL with a disability percentage of 40%. At a subsequent periodic reevaluation, his condition had deteriorated to the point where he maintained his disability was 60%. Accordingly, CAPT X requested to be maintained on the TDRL with a 60% disability vice 40%.

Section 1202 of Title 10, United States Code creates a Temporary Disability Retired List (TDRL) for members of a regular component whose disabilities are not yet determined to be of a permanent nature. That section also authorizes the Secretary concerned to place a person's name upon that list for a period of time not to exceed five years (see 10 U.S.C. 1210(h)). Section 1210 of Title 10, United States Code requires that a member who is on the TDRL shall be reexamined at least every eighteen months to determine if his disability has become permanent and stabilized and if so, the percentage of that permanent disability.

The amount of a member's retired pay while on the TDRL is determined by 10 U.S.C. 1401. In order to determine the amount of a member's retired pay while he is on the TDRL, you are referred to 10 U.S.C. 1401 by the last sentence of 10 U.S.C. 1202. Using the applicable formula (no. 2) under 10 U.S.C. 1401, it is easily seen that a member retired under the authority of 10 U.S.C. 1202 (i.e. placed on the TDRL) is entitled to elect either: (a) 2-1/2% of his years of service multiplied by his last monthly base pay, or (b) "the percentage of disability on the date his name was placed on the temporary disability retired list" multiplied by his last monthly base pay. It is clear then, that even though a member's physical condition might worsen while he is on the TDRL and his percentage of disability increase, such a member's entitlement to retired pay may not be increased.

Once it has been determined that a member who is on the TDRL has a permanent disability which has stabilized, or he has spent five years on the TDRL, such a member will be permanently retired under the authority of 10 U.S.C. 1201. This will necessitate recomputing the member's right to retired pay, this time by use of formula 1 of 10 U.S.C. 1401. At the time, the member may elect to receive as retired pay either (a) 2-1/2% of his years of service multiplied by his last monthly base pay, or (b) "the percentage of disability on the date retired" multiplied by his last monthly base pay. Where the member's percentage of disability has increased while he was on the TDRL, it is at the point of permanent retirement that he is entitled to use the higher percentage of disability to compute his retired pay.

Furthermore, 10 U.S.C. 1210 lists the only actions which Congress has authorized to be taken in regards to a member whose physical condition either improves or deteriorates while he is on the TDRL. The option to continue a member on the TDRL, but at a higher percentage of disability has not been extended. Therefore, under the legal doctrine of "Express unius est exclusio alterius" (to express one option means to exclude another), since Congress did not see fit to authorize increasing a member's disability percentage while he is on the TDRL, that course of action is not available.

The implementing regulations contained in Chapter 17-J of the Personnel Manual recognize this statutory requirement. Article 17-J-2(a)(26) states that "the change in the degree of the severity of the disability will not result in an increase or decrease in the amount of the evaluatee's retired pay so long as he/she (sic) is retained on the TDRL." I find this regulation securely based on statute and an accurate statement of the applicable law.

G-LGL memo 1850 dtd 23 AUG 79

STATUS OF TEMPORARY RESERVE

The Chief Counsel was asked whether a Coast Guard Auxiliarist who served as a member of the Temporary Reserve during World War II has attained the status of a veteran, with all attendant rights and privileges thereof.

The Commandant is authorized by 14 U.S.C. 756 to "enroll as temporary members of the Reserve, for duty under such conditions as he prescribes, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, citizens of the United States. . . who are members of the Auxiliary." This statute enabled the Coast Guard to make Auxiliarists temporary members of the Coast Guard Reserve during World War II.

Membership in the temporary Coast Guard Reserve does not confer any automatic entitlement to the same rights, privileges, and benefits as are enjoyed by a "permanent" member of the Coast Guard Reserve. Section 893 of Title 14 U.S. Code provides that "temporary members of the Reserve shall be entitled only to such rights, privileges, and benefits as are specifically set forth for them in [Title 14] or as may be specifically provided for them in any other Act of Congress which grants rights, privileges or benefits to temporary members of the . . . Reserve shall not be deemed applicable to . . . temporary members of the Reserve," (emphasis added). What this means is that unless a right,

entitlement or benefit is specifically extended to a member of the temporary Reserve, he has no claim to that right, entitlement or benefit.

For the purposes of entitlement to Veteran's Benefits, 38 U.S.C. 101(2) defines a veteran to be "a person who served in the active military naval, or air service and who was discharged or released therefrom under conditions other than dishonorable." The definition of active duty contained at 38 U.S.C. 101(2) does not include any service as a temporary member of the Coast Guard Reserve. Therefore, I must conclude that since a temporary member of the Coast Guard Reserve is not specifically included in the class of persons eligible to receive veteran's benefits, such a person is not now, nor has ever been, considered a veteran for that purpose.

G-LGL memo 16790 dtd 5 JUL 79

ADMINISTRATIVE DISCHARGE BOARDS

It was asked whether a member with over eight years service who is being considered for an honorable or general discharge for the convenience of the government is entitled to an administrative discharge board.

The Personnel Manual creates an entitlement to an administrative discharge board in the following cases:

- (a) in any circumstances where a member is being considered for a discharge under other than honorable conditions, see 12-B-16(i); and
- (b) at any time when a member with over eight years service is being considered for discharge by reason of unsuitability, see 12-B-32(a).

On its face then, the Personnel Manual provisions would require that the question be answered in the negative. There are several other factors which should be considered.

A member with over eight years service who is being denied the opportunity to re-enlist is entitled to go before a re-enlistment board. See 12-B-5(c). Since the Personnel Manual does not provide for an administrative discharge board for a member with over eight years service who is being considered for an honorable discharge for the convenience of the government, an anomalous situation appears to result. Why should a member with over eight years service who is

being denied the opportunity to re-enlist be entitled to a re-enlistment board but the same member not be entitled to an administrative discharge board if he is given an honorable discharge for the convenience of the government? The reason for this anomaly is that a member may be denied the opportunity to re-enlist for a myriad of unspecified reasons whereas the discharge for the convenience of the government is limited to the specific reasons contained in Article 12-B-12 of the Personnel Manual.

As a matter of law, if a person can show that a discharge will affect a property interest, then that member would be entitled to some sort of hearing to contest the basis for the separation from service. See Board of Regents v. Roth, 408 U.S. 564 (1972). In the case of a member being discharged from the Coast Guard, a showing that a property interest has been affected can be made if it can be shown that the discharge will be so stigmatizing in its effect that the member will have difficulty in finding work in the civilian community after discharge. The issuance of anything less than an honorable discharge has been found by several courts to have this effect. An honorable discharge for the convenience of the government would most likely not have such an effect since it is a discharge which is awarded in the normal course of events. Therefore, unless a member can show that he has a property interest which would be affected by discharge from the Coast Guard, the requirement for a due process hearing will not be triggered. In such a case, in order to be afforded an administrative discharge board, the member must show a statutory or regulatory entitlement to a hearing (see for example 10 U.S.C. 680(a); 681; 1162(c), 1163(c)). In the past it has been held that "a mere subjective 'expectancy' of continued employment" does not amount to a property interest. See Perry v. Sinderman, 408 U.S. 593 (1972). An individual who enlists in the Coast Guard does not have a vested right to a military retirement, although it must be noted that there are various statutes in Title 10 U.S. Code which give reservists certain rights in connection with their reserve status.

As a final note, the Supreme Court has held that due process requires a balancing test between the interest of the government and those of the individual.

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication (Goldberg v. Kelly, 396 U.S. 254, 90 S. CT 1011 (1970)).

The reasons upon which a 12-B-12 discharge for the convenience of the government may be based, (for example: general demobilization, motion sickness, obesity, enuresis, etc.) and the "governmental interest in summary adjudication" must be compared with the member's interest in not losing eight or more years of military service creditable towards a military retirement. No administrative discharge board need be held where the Coast Guard's need for a summary adjudication is identified by regulation and there is no conflict with a statutory or constitutional requirement for a hearing. If the existence of any of the reasons for discharge contained in Article 12-B-12 of the Personnel Manual is established by clear and convincing evidence and there is no likelihood of rebuttal, then, in the absence of regulations to the contrary, no board would be necessary before issuing the member an honorable discharge for the convenience of the government.

G-LGL memo dtd 29 JUN 1979

NY STATE LAW RELATING TO STANDARDIZED TESTING; POSSIBLE
EFFECT ON CG APPLICANT TESTING

A bill enacted by the New York Senate and Assembly which amended that State's education law by requiring certain testing organizations to file particular reports with the New York Commissioner of Education regarding the tests they administer is the subject of this memorandum. The tests within the scope of this Act are those given "at the expense of the test subject" for the purposes of "selection for post-secondary or professional school admissions."

Aside from the issue of federal supremacy or federal immunity from state regulation of governmental activities, I think it is clear that the tests given to applicants for enlistment or to officer candidates are not administered "at the expense of the subject." Hence, the law would not appear to have any effect upon our testing programs.

G-LGL memo dtd 11 SEP 1979

TRAVEL OF POTENTIAL CADET APPOINTEES TO THE ACADEMY FOR
PRE-APPOINTMENT PHYSICALS

Is there "any bar to changing the cadet selection procedure

to have all those in the selection zone travel to the Academy at Government expense in the spring for their appointment physicals?"

Under paragraph M5000 1. of the Joint Travel Regulations, a person "entering" the Academy is entitled to travel allowances. Under paragraph M5000 4. of the Joint Travel Regulations, a prospective cadet who travels to the Academy "for the purpose of accepting an appointment and is rejected for admission," such as for failure to pass the appointment physical, is entitled to certain allowances or round trip travel. Under paragraph M5002 2. of the JTR, no travel allowances are payable to members of the Reserve or civilians "for travel performed in connection with any examination preparatory to admission" to the Academy. Therefore, under these three paragraphs, no Reserve or civilian appointee may travel to the Academy at Government expense solely for the purpose of taking his or her appointment physical. These appointees must be traveling to the Academy for the primary purpose of accepting appointment to the Academy before payment of their travel with Government funds may be allowed.

I do wish to point out, however, that temporary duty travel allowances are authorized for certain pre-admission purposes for active duty members under paragraph M5002 1. of the Joint Travel Regulations.

G-LGL memo dtd 14 SEP 1979

BAS AND BAQ ENTITLEMENT FOR SHORE BASED PERSONNEL
ASSIGNED TO A VESSEL

A request for legal review of a proposal to assign five enlisted personnel to a vessel as a shore-based aids to navigation maintenance organization was reviewed. The personnel would perform the same function they performed while assigned to a base.

The proposal provided that the personnel would not perform services on board the vessel. They would not be quartered on board the vessel, but would obtain their own quarters on shore, and would be granted permission to mess separately and procure their own meals.

Under the proposed situation, the enlisted personnel would be entitled to BAQ. Their assignment to the vessel would not constitute "sea duty", which would preclude their entitlement to BAQ under 37 U.S.C. 403(c). Under Exec. Ord. No. 12094,

Nov. 1, 1978, 43 FR 51379, which amends §401(c) of Exec. Ord. No. 11157, Jun. 22, 1964, 29 FR 7973, "sea duty" is defined as "service performed by either an officer or enlisted member in a self-propelled vessel that is in an active status, in commission, or service and is equipped with berthing and messing facilities." The enlisted personnel will not be performing service "in a self-propelled vessel" and therefore are not precluded from entitlement to BAQ. (Please note that §203(c) of Exec. Ord. No. 11157 referred to in reference (b) was amended by Exec. Ord. No. 12094 without the provision quoted in reference (b).)

If the enlisted personnel are granted permission to mess separately and do procure their own meals, they are entitled to BAS under 37 U.S.C. 402(b)(2).

G-LGL 16533 Memo dated 3 July 1979

CORRECTION OF MILITARY RECORDS; WITH OR WITHOUT BCMR ACTION

The history behind and the Congressional intent of 10 U.S.C. 1552, which created the BCMR, is helpful for understanding what record changes may be made and what actions based upon those changes may be taken by the Commandant without acting through the BCMR. Before its enactment, the Secretaries of the Armed Services had no authority independent of Congress to change military records to remove an injustice or correct an error that had adversely affected an individual. The remedy for the individual was to request Congress to enact a private bill of relief. After World War II, the number of requests for private bills of relief increased considerably. Congress responded in 1946 by enacting the original 10 U.S.C. 1552, which authorized the Secretaries of the Armed Services, "acting through boards of civilian officers or employees of their respective departments," to correct military records "to correct error or remove an injustice." The requirement that the BCMR be comprised of civilians was based upon the concept that the errors or injustices were originally made by the military, therefore, correction of those errors and injustices should be in the hands of civilians. (See Francis J. Proper v. U.S., 139 Ct. Cl. 511 (1957).)

The 1946 enactment, however, did not solve all the problems. Corrections made under the statute often resulted in the accrual of monetary benefits. In 1948, the Comptroller General ruled that the authority of § 1552 did not extend to the payment of monetary benefits derived therefrom. (27 Comp. Gen. 665 (1948); 27 id. 709 (1948)). This ruling was consistent with a long line of rulings prohibiting retroactive payments without express Congressional authority, which

rulings would still be applicable to corrections made under §1552 if it were not for an amendment passed in 1951. (See 52 Comp. Gen. 920, at 923 (1973); 50 id. 125 (1970); 40 id. 207, at 209 (1960); at 39 id. 583, at 585 (1960); 33 id. 140, at 141 (1953); 31 id. 191, at 192 (1951); 24 Comp. Dec. 582, at 585 (1818)). The amendment permitted the respective service secretaries to make payments as result of corrections by the BCMR and provided that BCMR decisions were final and conclusive upon all officers of the Government, except in cases of fraud.

Basically, when a proposed correction is one that falls within the jurisdiction of the BCMR under § 1552, the Commandant may not make the correction without acting through the BCMR. The Comptroller General has described the type of record change that requires BCMR action as a change "that would result in a change of material fact or the creation of a new record." (52 Comp. Gen. 952, at 955 (1973); B-186070, October 28, 1976) In its simplest terms, the rule is that BCMR action is required when the records correctly state the facts about what actually occurred, but the facts should be replaced by a fiction to undo an error or injustice. The BCMR may correct a record to undo what has been done or do what should have been done. (See 40 Ops. Atty. Gen. 504 (1947); Ops. JAGA 1952/62, 28 Jan. 1952. See also Ops. JAGA 1951/6749, 16 Nov. 1951; id. 1952/3229, 1 April, 1952; id. 1953/1741, 9 Mar. 1953.) Perhaps the most important aspect of corrections made through the BCMR is that the individual whose records are corrected becomes entitled to the amount of money that would have been due to him if the error or injustice had not existed originally and thus may receive retroactive payment. (50 Comp. Gen. 125, at 127 (1970); 49 id. 440, at 441 (1970); 45 id. 47, at 48 (1965); Ops. JAGA 1951/6749, 16 Nov. 1951.)

This is not to say that the Commandant must act through the BCMR to make any change to an individual's record, even if certain rights to compensation are ultimately affected. The individual's record may be administratively corrected to reflect the facts. BCMR action is not required when no new facts are "created" and, where applicable, no new entitlement is given retroactively. (41 Ops. Atty. Gen. 94 (1952); B-186322, August 20, 1976.) For example, if an officer had in fact been promoted and had served in the new rank, but, because of a clerical error, his records show an incorrect date of rank, the Commandant may change the officer's record to reflect the correct date of rank. This correction creates no new fact and does not give an entitlement that did not in fact exist. In contrast, if an officer had been qualified for promotion but through an administrative error, was not

considered by a selection board, the Commandant may not change the Officer's record to reflect a promotion on the date he should have been promoted and, thus, may not authorize retroactive entitlement to pay and allowances. That change and authorization must be made by the Secretary acting through the BCMR.

G-LGL memo dtd 3 OCT 1979

RATION ENTITLEMENTS OF COAST GUARD CADETS; THE
MEANING OF "COMMUTATION"

The per capita amount of appropriated funds used to purchase food for Coast Guard cadets is not limited to the amount set by the Secretary of the Navy as the commuted value of the daily ration. (The commuted value of rations for Navy midshipmen, as set by the Secretary of the Navy under the authority of 37 U.S.C 422(b), is also the commuted value of rations for Coast Guard cadets, under 37 U.S.C. 422(a).)

The Court of Claims has defined "commutation" as "money paid in substitution of something to which an officer, sailor, or soldier is entitled by law or regulations or the general orders of the Commander and Chief." The court also stated that, "commutation is not necessarily equal to the value of the thing for which it is a substitute, but it is supposed to be, in the general average of cases, a fair equivalent." Jaegle v. United States, 28 Ct. Cl. 133, 135 (1893).

Thus, conversely, the amount spent per capita on food for cadets does not have to equal the commuted value of the ration. It would appear, however, that because of the interrelationship of rations and commutation of rations under § 42, the amount spent for rations under the authority of that statute should be reasonably close to the commuted value.

G-LGL memo dtd 28 AUG 1979

FEDERAL EMPLOYEES FLEXIBLE AND COMPRESSED WORK
SCHEDULES ACT OF 1978

Congress has authorized federal agencies to experiment with flexitime and a compressed work week through passage of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Pub. L. 95-390, Sept. 29 1978. The question as to the termination of an experiment once undertaken was considered by the Congress. Section 202(c) of the Act allows a federal agency which is experimenting with a flexible or

compressed work schedule to terminate such experiment conducted under the authority of the Act whenever it is "determined that the experiment is not in the best interest of the public, the government, or the employees." The right to terminate an experiment is granted subject to the terms of any written agreement between the agency and an organization of government employees which has been accorded exclusive recognition; that is, a union. Therefore, unless the Coast Guard has entered into an agreement with an employee's union which provides that the experiment may not be terminated once it has begun, an experiment with a compressed work week under the authority of the subject Act may be terminated at any time, provided the agency determines it is not in the best interest of the public, the government or the employees. It must also be noted that the Congressional authority to conduct these experiments expires on 1 April 1981. Therefore, unless Congress extends the authority to experiment with flexible and compressed work schedules, all of these experiments must cease on or before that date.

An experiment under the provisions of the subject Act could have an effect upon an employee's right to receive night differential pay. Section 5545(a) of Title 5 United States Code provides that an employee who is regularly scheduled to work between the hours of 6:00 p.m. and 6:00 a.m. is entitled to a night differential pay equal to his basic rate of pay plus a premium pay equal to 10% of his basic rate. In authorizing flexitime, Congress considered the impact which a flexible scheduling of work hours might have upon an employees night differential. Section 103(c)(1) provides that "premium pay for nightwork will not be paid to an employee otherwise [eligible for night premium pay] solely because the employee . . . elects a time of arrival or departure, at a time of day from (sic) which such premium pay is otherwise authorized." However, there is no such prohibition against the payment of night differential pay. Therefore, in order to avoid the necessity for the payment of such premium pay, it is incumbent upon the decision maker to insure that the hours of a compressed work day do not fall between the hours of 6:00 p.m. and 6:00 a.m. It should also be noted that flexitime and a compressed work schedule may not be combined because the two programs are bifurcated. That is mutually exclusive. Under flexitime all hours worked in excess of eight hours are overtime whereas in compressed time the workday may exceed eight hours without the payment of overtime. Additionally, the Office of Personnel Management will issue regulations to prohibit the combination of flexitime and compressed time.

An employee who feels that the compressed work schedule has worked a hardship upon him has certain rights. Section

202(b)(2) provides that if an employee submits a written request to the agency, and the agency determines that the compressed work schedule would "impose a personal hardship upon the employee" the agency shall: (a) except such employee from the experiment, or (b) reassign such employee to the first position with the agency -

- (i) which becomes vacant,
- (ii) which is not included within the experiment,
- (iii) for which the employee is qualified, and
- (iv) which is acceptable to the employee.

If a significant number of employees choose to exercise their rights under this section of the Act it could work administrative burden upon the Coast Guard to comply with the requirements of the statute.

Finally, it should be noted that this Act applies only to civilian employees of the Coast Guard. The Commandant can set whatever working hours for military members he deems necessary.

G-LGL memo dtd 11 SEP 1979

FLOAT PLAN CLUBS

It was suggested that the Coast Guard establish a set of specifications for Float Plan Clubs which would permit a club which meets the Coast Guard specifications to announce to the boating public that it has Coast Guard approval. Essentially, the suggested idea provides for the Coast Guard to specifically approve the Float Plan Club procedures of a Float Plan Club seeking Coast Guard approval. An approval by the Coast Guard of the club's procedures would permit the club to advertise that it has Coast Guard approval.

For the reasons set forth it is not feasible for the Coast Guard to take on the legal burden associated with approving specific Float Plan Club procedures. Coast Guard approval of specific procedures is bound to generate additional claims and litigation based on a non-Coast Guard activity. This increase in claims would lead to an increased administrative burden and cost due to the necessity of gathering evidence to prepare a defense even though the claim is spurious. Moreover, Coast Guard approval of specific procedures creates a nexus to the Float Plan Club's procedures which shortens the step to Coast Guard liability, if, in a given case a claimant establishes that a search and rescue effort failed because the Coast Guard failed to use reasonable care in assuring that approved procedures met the published Coast Guard standards or if the claimant can establish that the

Coast Guard standards were defective.

I have no objection to the Coast Guard publishing standards for what the Coast Guard believes to be satisfactory Float Plan Club procedures. If a Float Plan Club's procedures adhere to Coast Guard published standards, the Float Plan Club could publicize that its procedures satisfy Coast Guard published standards. Under this suggestion, the Coast Guard would neither approve any specific procedure, nor would the Coast Guard be responsible for assuring that a specific procedure used by a Float Plan Club meets Coast Guard standards.

In view of the above observations, I recommend that you consider maintaining the current policy of encouraging the boating public to file float plans with a responsible person remaining ashore who, when the circumstances arise, would inform the Coast Guard of the plan. Basic float plan formats have already been disseminated throughout the country and the boaters have been made aware of the present Coast Guard policy which encourages the filing of float plans. If this policy is retained, a Float Plan Club may be utilized in lieu of an individual. If a boater files a float plan with a Float Plan Club rather than with an individual, I see no change to the Coast Guard potential legal liability, even though the Coast Guard publishes suggested standards which are adhered to by a Float Plan Club, provided, of course, that the published standards are not defective.

G-LGL memo dtd 17 SEP 1979

POST RETIREMENT EMPLOYMENT

This is in reply to your letter ... requesting an advisory opinion concerning your status as a retired Regular Coast Guard officer while employed by a shipyard engaged in ship repairs and conversion work under contracts with various government agencies including the U.S. Coast Guard.

Under 37 U.S.C. 801(c), an officer on the retired list of the Regular Coast Guard cannot receive retirement pay, during a period of three years after his name is placed on that list, while he "is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service." The phrase "selling or contracting or negotiating to sell" has been interpreted to include

virtually all activities surrounding the selling process, including signing a bid, proposal, or contract, negotiating a contract, contacting an officer or employee of any of the listed agencies for the purposes of obtaining or negotiating contracts or negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or any other liaison activity with a view toward the ultimate consummation of a sale even though the actual contract is subsequently negotiated by another person.

Under 18 U.S.C. 281 in the federal criminal statutes, a retired officer is legally prohibited from representing any person in the sale of anything, including services, to the Government through the department in whose service he holds a retired status. Although the exact meaning and scope of the words "represent" and "sale" are not clear, the Federal courts have ruled that the statute was aimed at "influence peddling" and that the retired officers are included because they have built up, during their career, contacts with persons who negotiate contracts for their department. The Federal courts have also ruled that to be in violation of this criminal statute, the person must act with "corrupt or venal motives."

It is obvious that the provision of 37 U.S.C. 801(c), insofar as the legal prohibition in the payment of retirement pay, is not applicable to you, having been retired in 1974. However, it is possible that you may be in violation of 18 U.S.C. 281 if you perform any of the functions prohibited under 37 U.S.C. 801(c) in connection with sales to the Department of Transportation in a way that could be interpreted as "influence peddling" because of your past connections with the Department of Transportation. I must emphasize that this is a lifetime prohibition under a criminal statute. To avoid violating the statute, I would advise that you not participate in any way in the sale of anything, on behalf of your employer, to the Department of Transportation.

This letter is only an advisory opinion. The final administrative interpretation of 37 U.S.C. 801(c) is a function of the Comptroller General, and that of 18 U.S.C. 281 is a function of the Attorney General.

G-LGL ltr dtd 19 SEP 1979

GIVING "BOOKER" ADVICE RENDERS ONE
INELIGIBLE TO PERFORM ARTICLE 65(c)
REVIEW IN SAME CASE

A petty officer was tried by summary court-martial convened by the Commanding Officer of Enlisted Personnel,... Coast

Guard District. The P.O. pleaded guilty to and was convicted of a single charge and specification alleging unauthorized absence from 6 December 1978 until 10 January 1979 in violation of Article 86, UCMJ, 10 USC 886. The summary court-martial sentenced the accused to forfeit \$100 pay per month for two months and to perform extra duties for 35 days. This sentence was approved by the convening authority and by the Commander,... Coast Guard District.

Papers attached to the record of trial disclose that on 22 January 1979 and again on 20 February 1979 the P.O. consulted with a legal specialist concerning his rights with regard to accepting or refusing trial by summary court-martial. These consultations with a legal specialist, were in compliance with U.S. v. Booker, 5 M.J. 238 (CMA 1977) as construed in ALDIST 303/77 and now incorporated in section 306-2 of the Coast Guard Military Justice Manual (CG-488). These consultations between the P.O. and the legal specialist established an attorney-client relationship. The action of the Commander,... Coast Guard District states that the record of trial had been reviewed pursuant to the provisions of Article 65(c), UCMJ, by that same law specialist who was assigned to the Commander's staff.

In U.S. v. Green, 5 USCMA 610, 18 CMR 234 (1955), the military lawyer who represented the accused at the Article 32, UCMJ, investigation of charges subsequently prepared a memorandum of the testimony which would probably be offered against Green if his case went to trial as it eventually did. This memorandum was prepared by counsel at the direction of the legal adviser to the officer exercising special court-martial jurisdiction over the accused and was provided to the trial counsel of the general court-martial which convicted the accused. The lawyer who prepared the memorandum served only as counsel for the accused at the Article 32 investigation and did not participate in the subsequent trial. The Court of Military Appeals found that the lawyer's preparation of the memorandum was a breach of the attorney-client privilege denying the accused a fair trial. The court noted the provision of Article 27 (a), UCMJ, that "no person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution." Condemning the practice of military lawyers serving in more than one capacity in a case the court said:

"We have previously expressed displeasure at the practice by which legal officers are permitted to play dual roles in the

same court-martial transaction. See U.S. v. Coulter, 3 USCMA 657, 14 CMR 75; U.S. v. Clisson, 5 USCMA 277, 17 CMR 277; U.S. v. Crunk, 4 USCMA 290, 15 CMR 290. We deem the rationale of those decisions to be fully applicable to the present case--for if a military accused person is to rely on the professional responsibility and integrity of counsel, the confidence reposed in the latter must not be shattered by the fear that the confidant may be assigned subsequently to duties involving adversity to the interest of his one time client." 18 CMR at 241.

In U.S. v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955), the accused had consulted with X, a military lawyer, regarding his current and past marital status. McCluskey was subsequently referred for trial on charges including bigamy and the making of a false official statement with regard to his marital status. X was one of the trial counsel of the court-martial to which the charges were referred for trial and assisted Major Y in preparing a message requesting that deposition testimony be taken from relatives of McCluskey's first wife. X was relieved of his duties as trial counsel and did not participate in the trial of McCluskey's case. Finding that the accused was prejudiced with regard to the bigamy and false official statement offenses the court said:

"It may be accepted as settled law in this court that, since a lawyer is bound by professional duty to avoid divulgence of a client's confidences to the disadvantage of the latter, doubts concerning equivocal or apparently inconsistent conduct on the part of the attorney must be resolved against him--that is, it must be regarded as having been antagonistic to the best interests of his client.

"Thus, regardless of the purity of his motives, it is demanded that the lawyer avoid the very appearance of that wrongdoing which, in obedience to the important policy dictating this privileged relationship, the courts are impelled to deplore--for 'no rule in the ethics of the legal profession is better established

nor more rigorously enforced than this one'.
In re Boone [83 Fed 944 (ND Cal)]."

"Here, the attorney, as a result of professional consultations, must necessarily have acquired from the accused information concerning one or more of the offenses charged against him in the present case. It is clear to us that he was thereby rendered ineligible for service as a member of the Government's legal staff***." 20 CMR 266, 286.

See also U.S. v. Thornton, 8 USCMA 57, 23 CMR 281 (1957); U.S. v. Turley, 8 USCMA 262, 24 CMR 72 (1957); U.S. v. Collier, 20 USCMA 261, 43 CMR 101 (1971); U.S. v. Walker, 47 CMR 288 (ACMR 1973).

In U.S. v. Williams, 21 USCMA 292, 45 CMR 66 (1972), the acting Judge Advocate General of the Air Force considered clemency reports submitted to him including one from the trial defense counsel and suspended execution of the bad conduct discharge in the appellant's case for a probationary period with provision for automatic remission. The acting Judge Advocate General's action accompanied by the appellant's copy of the decision of the Court of Military Review was forwarded to appropriate authorities at Kincheloe Air Force Base for delivery to the appellant. These papers were not delivered to the appellant but instead were returned to Headquarters U.S. Air Force with a request that consideration be given to modifying the action relative to the unexecuted portion of the appellant's sentence. This request was based on information contained in statements from other Air Force personnel reflecting adversely on the conduct of the appellant since his release from confinement. The letter from Kincheloe Air Force Base transmitting the information and recommendation adverse to the accused was signed by a Captain Hemann as assistant staff judge advocate. Captain Hemann did not initiate or participate in the taking of the statements reflecting misconduct by the accused but merely signed the letter transmitting the information to the Judge Advocate General at the explicit direction of the staff judge advocate. Captain Hemann was the defense counsel at the appellant's trial.

Testing the propriety of Captain Hemann's ministerial action in signing the letter of transmittal as assistant staff judge advocate the Court of Military Appeals quoted from Article 27(a), UCMJ and from U.S. v. Green, 5 USCMA 610, 18 234 (1955) and concluded:

"In the case at bar Captain Hemann had acted as defense counsel, and it was still in the process of appellate review. See paragraph 48b(3) Manual for Courts-Martial, United States, 1969 (Revised edition). Therefore, his later role as assistant staff judge advocate was illegal. Article 27(a), Code, supra; United States v. Green, supra, and cases cited therein." 45 CMR at 69

In this case LT A had established an attorney-client relationship with the P.O. during the consultations with him respecting his rights in January and again in February 1979. Having done so he was thereby rendered ineligible for service as a member of the government's legal staff to review the record of trial pursuant to Article 65(c), UCMJ. The prejudice to the accused is limited to the review and action by the officer exercising general court-martial jurisdiction and did not deprive the accused of a fair trial. See U.S. v. Daigneault, 30 CMR 918 (AFBR 1961).

The action of the Commander,... Coast Guard District is set aside. The record of trial will be forwarded to another officer exercising general court-martial jurisdiction for review pursuant to the provisions of Article 65(c), UCMJ.

G-L-3 Action 5818 dtd 24 SEP 1979

DECISIONS AND OPINIONS OF APPELLATE COURTS ARE
NOT SELF EXECUTING - DELIVERY FOR COMPLIANCE
IS WHAT COUNTS

WHERE OFFENSE IS SUCH THAT TRIAL BY JURY IS NOT
REQUIRED, O'CALLAHAN V. PARKER DOES NOT APPLY

Action pursuant to Article 69, UCMJ, U.S. v. Sullivan, 21 June 1979.

A Seaman Apprentice was tried by Summary Court-Martial. Charge I and the single specification thereunder alleged the failure to obey a lawful order issued by the Commanding Officer, in violation of Article 92, UCMJ. The two specifications of Charge II alleged respectively the wrongful possession and wrongful use of marijuana in violation of Article 134, UCMJ. Charge III and the single specification thereunder alleged assault upon a petty officer in the execution of shore patrol duties in violation of Article 128, UCMJ. The accused was represented at trial by detailed defense counsel.

On motion of defense counsel prior to the entry of pleas, the Summary Court-Martial dismissed Charge I and the specification thereunder alleging a failure to obey a lawful order in violation Article 92, UCMJ, on the ground that the order alleged to have been violated was advisory rather than punitive. The accused then pleaded not guilty to the remaining charges and specifications. Following the presentation of extensive evidence for both the government and the defense, the Summary Court-Martial found the accused guilty of Charge II and the specifications thereunder and, by appropriate exceptions, guilty only of assault consummated by a battery under Charge III. The Court sentenced the accused to be confined at hard labor for thirty days and to be reduced to pay grade E-1. The findings of guilty and the sentence were approved by the convening authority and by the officer exercising general court-martial jurisdiction.

Through counsel the accused has petitioned for relief pursuant to the provisions of Article 69, UCMJ, urging that the findings of guilty and the sentence must be set aside and the charges dismissed for various reasons. Only the following asserted ground for relief will be discussed:

"4. THE FINDINGS OF GUILTY AS TO EACH
CHARGE MUST BE SET ASIDE ON THE AUTHORITY
OF THE RECENT DECISION IN UNITED STATES V. BOOKER,
3 M.J. 443 (CMA 1977)."

In Charge III and the specification thereunder the accused was alleged to have assaulted a petty officer, a person then having and in the execution of Shore Patrol duties. The assault is alleged to have occurred at the landing ramp, while the accused was on liberty.

The evidence in support of this charge reveals that the vessel was anchored and had put a liberty party, including the accused, ashore by small boat at about 1800 with liberty to expire at 2400. The petty officer was assigned Shore Patrol duties from about 1830 to 2400. He was issued a night stick and a blue arm band with the letters MAA in yellow. Both the Shore Patrol and the liberty party were wearing dungarees.

At about 2330 the launch arrived to return the last segment of the liberty party to the vessel. The petty officer was trying to account for all personnel ashore and was told by a seaman apprentice that some of his friends were at a bar some distance away. The petty officer accompanied by the seaman apprentice headed toward the bar. They had walked 40 or 50 yards from the launch in the general direction of the bar when

they heard yelling and turned to face the direction from which the yelling was coming. At that point the petty officer saw the accused running toward him and heard the accused say something to the effect, "I know what you did, I'm going to get you for it." The petty officer attempted to dodge the accused's charge but was struck a glancing blow to the stomach by the accused's fist. The petty officer avoided further attacks until the accused was brought under control by other Coastguardsmen present and headed toward the launch. The accused then came at the petty officer again and struck him in the face with his fist. The petty officer did not inform the accused that he was on shore patrol duty and did not know whether the accused was aware of his status. The accused was drunk.

In the Article 38(c) briefs, counsel assert that the Summary Court-Martial was without jurisdiction to try the accused on Charge III and the specification which culminated in the conviction of the accused of assault consummated by a battery in violation of Article 128, UCMJ. This assertion is based on the action of the Court of Military Appeals in U.S. v. BOOKER, 3 M.J. 443, 447 (CMA 1977), 5 M.J. 238, 242 (1977) limiting the jurisdiction of summary courts-martial as follows:

****[W]e find it necessary to limit summary courts-martial to disciplinary actions concerned solely with minor military offenses unknown in the civilian society."

U.S. v. BOOKER was decided 11 October 1977, the very day that the accused was convicted and sentenced. But the decisions and opinions of appellate courts are not self executing. Cases must be returned to those lower levels where officials and parties can be ordered to implement the courts' judgment. The device which usually communicates the judgment to those lower levels is the mandate. The mandate demands action in compliance with an opinion or decision of the court even if action is not explicitly directed. The term mandate is the one most frequently used in this context but there is no magic in the term. The operative event is the communication of a direction from a higher court to a lower forum whether it be styled mandate, decree, judgment or otherwise. Delivery for compliance is what counts. U.S. v. TANNER, 3 M.J. 924 (ACMR 1977) and cases cited at 3 M.J. 926. Petition for review by USCMA denied 4 M.J. 169.

A mandate in U.S. v. BOOKER, supra, was transmitted on 25 October 1977 but it was rescinded on 28 October 1977.

Consequently, it was never effective. When the case was reconsidered, the limitation formerly imposed by the Court upon the type offenses which might be tried by summary court-martial was removed. U.S. v. BOOKER, 5 M.J. 246 (CMA 1978).

In the meantime, the Commandant issued ALDIST 303-77 on 21 October 1977 disseminating the apparent limitations and requirements imposed by the Court in BOOKER and in U.S. v. Alef, 3 M.J. 414 (1977), the latter dealing with the pleading and proof of jurisdiction. The ALDIST interpreted BOOKER as limiting summary court-martial jurisdiction to certain articles of the Uniform Code of Military Justice dealing with strictly military offenses. Assaults in violation of Article 128, UCMJ were not included among those articles believed to remain subject to summary court-martial jurisdiction.

Even had ALDIST 303-77 actually limited the jurisdiction of summary courts-martial to offenses charged as violations of the Articles of the Code enumerated therein, there is no indication that it was intended to have retroactive effect so as to bring the accused's case within its purview. But more than that the plain language of the ALDIST makes clear that it was advisory rather than directive, interpreting U.S. v. BOOKER rather than independently establishing limitations on summary court-martial jurisdiction. It is concluded then that neither U.S. v. BOOKER nor ALDIST 303-77 deprived the summary court-martial of jurisdiction to try the accused for the offense of assault upon a person in the performance of shore patrol duties or of jurisdiction to convict him of the lesser included offense of assault consummated by a battery in violation of Article 128, UCMJ.

There remains the question whether the assault offense of which the accused stands convicted was, under the facts of this case, subject to court-martial jurisdiction in contemplation of O'CALLAHAN v. PARKER, 395 U.S. 258, 23 L. Ed. 2d 291, 89 C Ct 1683 (1969), Relford v. Commandant, 401 U.S. 355, 91 S Ct 649, 28 L Ed 102 (1971), U.S. v. Borys, 18 USCMA 547, 40 CMR 259 (1969), U.S. v. Hedlund, 2 M.J. 11 (1976) and other cases circumscribing the jurisdiction of courts-martial to try a military member for other than purely military offenses for which the member may be tried in a federal or state court. At the time of the assault upon the petty officer the accused was ashore in uniform on limited and controlled liberty. The duration of the liberty was for only six hours (1800-2400).

The ship's motor launch was the only mode of transportation to and from the beach. There was no pier in the area and it

was necessary for the launch to beach in order to deliver or pick up personnel. The shore patrol was landed shortly after the launch put the first segment of the liberty party ashore. The shore patrol was charged with the general responsibility for supervising personnel on liberty and insuring their return to the vessel. Among other things they were responsible for "rounding up drunks and sending them back to the ship, prevention if possible of the theft or joyriding in government or other vehicles not belonging to members of the vessel, suppression of drug traffic if observed, and general maintenance of order by vessel personnel ashore." Implicit in the shore patrol mission was to assure that personnel on liberty did not become involved with state or local law enforcement authorities. It further appears from the evidence the shore patrol was exclusively in charge of the landing area with no civilians present or involved.

The petty officer and the accused were fellow members of the vessel's crew, the petty officer being the superior petty officer of the accused. At the time of the assault, the petty officer was in uniform and in the performance of shore patrol duties. The assault occurred while the petty officer was performing a primary function of ensuring that the accused and other members of the liberty party were returned to the vessel by 2400 on the last boat. The assault was committed in the vicinity of the small boat landing which at the time was apparently being used exclusively for Coast Guard purposes.

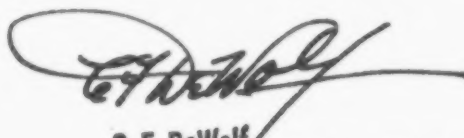
Clearly the circumstances surrounding the offense constitute a strong, if not compelling, case for the exercise of court-martial jurisdiction within the factors enumerated by the Supreme Court in Relford v. Commandant, supra. Certainly the Coast Guard interest in the offense was paramount and that interest could only be adequately vindicated by a court-martial. But the question of jurisdiction need not rest on a balancing of the Relford factors.

The maximum punishment authorized by the Table of Maximum Punishments, Paragraph 127c, MCM, 1969 (Rev.) for the offense of assault consummated by a battery is confinement at hard labor for 6 months, forfeiture of two-thirds pay per month for 6 months and reduction in grade if applicable. Under the law of Alaska assault and battery is punishable by a fine of not more than \$500, or by imprisonment in a jail for not more than six months, or by both. Indictment by a grand jury is not required and the case may be heard by a district magistrate or, if the defendant pleads not guilty and does not consent in writing to trial before the magistrate alone, he may be tried by a jury of six members. See generally Alaska Statutes Title 11, Chapter 15, Section 11.15.230, Title

22, Chapter 15, Sections 22.15.120 and 22.15.150 and Rule 7(a), Alaska Rules of Criminal Procedure. The offense then is within the class which the Supreme Court has held do not require a jury trial. Cheff v. Schnackenberg, 384 U.S. 373, 16 L Ed 2d 629, 86 S. Ct 1523 (1966); Duncan v. Louisiana, 319 U.S. 145, 20 L Ed 2d 491, 88 S Ct 1444 (1968).

In O'Callahan v. Parker, *supra*, the Supreme Court made clear that its purpose was to preserve to the individual service member his constitutional right to indictment and trial by jury in the case of traditional civil-type offenses having no service connection. Thus, where the offense is such that indictment and trial by jury is not required, O'Callahan v. Parker does not apply. U.S. v. SHARKEY, 19 USCMA 26, 41 CMR 26 (1969).

The summary court-martial which tried the accused was properly constituted and had jurisdiction over the accused and the offenses of which he was convicted. His conviction of assault consummated by a battery upon the petty officer in violation of Article 128, UCMJ, is correct in law and fact and the request for relief with respect to that charge is denied.



C. F. DeWolf
Rear Admiral, U. S. Coast Guard
Chief Counsel

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DEPARTMENT OF TRANSPORTATION



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STATUS OF "SHIPPING COMMISSIONERS," AS OF 1 OCTOBER 1979

The situation is brought about by language in the "appropriation" bill: "...none of these funds shall be available for pay or administrative expenses in connection with shipping commissioners." There are questions with respect to the intent of the proviso, with respect to the identity of "shipping commissioners," and with respect to the functions which may be curtailed. There is also for consideration whether, given some functions as eliminated, some other method is available to achieve the same results formerly reached. In the background for all these are several elements:

- (1) The subject as apparently discussed in the hearings before the subcommittee
- (2) The state of the statutory law insofar as it dictates action by the administrator
- (3) The state of the organization as used by the administrator at present.

It must first be understood that the matter is not as simple as the brief discussion before the subcommittee might indicate. ("Hearings," pp. 349-351) The conclusions to be reached from that record include the following:

- (1) There are 32 persons who may be identified as "shipping commissioners," 24 warrant officers and 8 civilians;
- (2) The duties of "shipping commissioners" are only the enforcement of what was the 1872 Shipping Commissioner Act (in connection with "signing on" and "signing off" crews of certain vessels);
- (3) There is a negligible function of arbitration of disputes between masters and seamen; and
- (4) The keeping of records of seamen's experience is an extremely beneficial one for industry (among shipping commissioner functions).

Except for the fact that this last function was a function at the Bureau of Marine Inspection and Navigation (as an agency, to which the commissioners forwarded materials), the duties here seem clearly identifiable so that a simple decision could be made that they not be performed. Nevertheless, subsequent to 1872 a few other duties were placed on shipping commissioners and the performance or future non-performance of these must be considered if the proviso becomes law.

The first fact in the identification of "shipping commissioner" is that the term was a creature of statute and so was the office. Prior to 1946 there was a body of law which spoke of shipping commissioners and assigned duties and authority to them. Reorg. Plan 3-46 flatly and outright abolished the office of "shipping commissioner." It transferred to the Commandant of the Coast Guard all the powers, duties, and functions of the abolished office and all the powers of the Secretary of Commerce relative to them. It must be noted here that there were other "abolitions" involved, of primary importance here (for their connections with shipping commissioners) being the offices of local inspectors and the Bureau of Marine Inspection and Navigation itself, all powers and functions of all of which, plus the powers of the Secretary with respect thereto, were similarly vested in the Commandant. (For convenience, further short-cut transfers of authority are not considered and the identity and powers of the Commandant are assumed to continue to date.)

The plan provided that the functions transferred could be performed "through such officers and employees of the Coast Guard" "as may be designated by the Commandant." Thus, delegation is possible (and, in practice, necessary), but the powers and duties are primarily vested in only one person, the Commandant. It is assumed that the duties, etc., of "shipping commissioners" are still those of the statutes, no matter the name given to the performing functionary nor the mode of "designation" ("delegation"). The editors of the U.S. Code have chosen to replace the term "shipping commissioner" in the statutes with the term "Coast Guard official to whom the duties of shipping commissioner have been delegated," a device that creates technical confusion. In a note to 46 U.S.C. 1 the editors have carried, apparently on representation of the agency, this statement:

"Under Coast Guard regulations...it appears that the Coast Guard personnel now performing the duties of the former shipping commissioner are also designated shipping commissioners."

This understanding is reflected in the loosely worded discussion in the hearings cited.

R.S. 4501 (46 U.S.C. 541) was the basic authority for appointment of shipping commissioners. They were authorized for "ports of entry" which were also "ports of ocean navigation." Originally functionaries of the circuit courts, they were transferred through Treasury, and Commerce and Labor, to Commerce. When they were abolished in 1946 and the functions (both of the commissioners to act and of the Secretary to appoint) were transferred to the Commandant,

there might have been a question whether the Commandant could delegate the powers to persons at other places than the statute authorized. (Insofar as formal delegation can be found it seems that he did.) Speculation could be even more far-ranging now because the statute giving power to appoint was repealed in 1966 in the process of codifying Title 5, U.S. Code. The only theory that can now support the existence of one or more officials to perform is that Reorg. Plan 3-46 itself substantively, if not formally, repealed R.S. 4501, and served as a new legislative grant of power to appoint. It would follow that the Commandant could delegate without regard to the "port of entry" limitation.

The powers and duties of shipping commissioners were several, not all stemming from the original 1872 Act. Those stemming from the Act itself were spelled out in the section of the Revised Statutes paraphrased here.

R.S. 4508 (46 U.S.C. 545, 1940 ed.) required each individual shipping commissioner to keep a register of the names and characters of seamen, to superintend their shipment and discharge as "prescribed by law" (obviously requiring recourse to other statutes for understanding), to provide means for the securing the presence on board of engaged seamen, to facilitate the making of apprenticeships, and to perform other duties "required by law" (again linking to other statutes). Of these assignments, all but those necessarily linked to other laws for understanding of the real "duties" have disappeared by reason of changes of custom, operation of other laws, or social change. This section is therefore essentially, today, a zero in practical effect.

R.S. 4509 and 4510 (46 U.S.C. 561 and 562) both deal with apprenticeship and are, for the reasons given just above, obsolete.

R.S. 4512 (46 U.S.C. 565) introduces the first major function of the commissioner. The "shipping agreement" for every voyage subject to R.S. 4511 (46 U.S.C. 564) must be executed by the master and the seamen in the presence of a payment of wages. R.S. 4549 (46 U.S.C. 641) directs that every seaman discharged in the United States from a vessel to which R.S. 4511 applies, whether in the course of or at the end of a voyage, must be discharged before a commissioner. R.S. 4550 (46 U.S.C. 642) requires a master to render a statement of wages due a seaman to a commissioner before discharge. R.S. 4552 (46 U.S.C. 644) provided for a release, with respect to wages paid, to be certified by the commissioner and to be kept by him. It provides also that at a master's request the commissioner will certify the entire amount paid to a crew (this certificate to be evidence of the master's discharge of

his obligation to his owner). Records specifically mentioned in this section were intended as evidentiary matter in possible later disputes. R.S. 4553 (46 U.S.C. 645) requires a master to file with the commissioner a report of the character, qualifications, and conduct of each seaman discharged, with the commissioner keeping a "register" of such reports. (See discussion of official log books.) R.S. 4554 (46 U.S.C. 651) requires a commissioner to serve as arbiter between seaman and owner or master in the case of any dispute submitted to him in writing, the adjudication to be conclusive in any subsequent legal action. (This function is almost never exercised, presumably because in practically all occasions when the process is available, social change, i.e. the unionization of seamen, is present as a factor in the discharge, providing other modes of relief.) R.S. 4555 (46 U.S.C. 652) conferred powers on the commissioner for the proceedings authorized under R.S. 4554. The powers have withered directly as the disappearance of the process.

R.S. 4538-4535 (46 U.S.C. 621-628) give the shipping commissioner duties with respect to disposition of wages and effects of deceased seamen. The original enactment was pertinent since the commissioner was a court officer; what remains in the relationship now is somewhat attenuated. Consular activity is also provided for in these sections. Insofar as consuls must, in some instances, refer to shipping commissioners, they will have no official to refer to.

In addition to these functions which are relatively unchanged from the original 1872 Act, some have been added by amendment of preexisting law, others by collateral legislation. Of the former class the amendments of 1936 and 1937 to R.S. 4551 (46 U.S.C. 643) are significant. The original text required the master of a vessel subject to R.S. 4511 to issue a certificate of discharge to each member of the crew and then, irrelevantly, authorized the master to perform the duties of commissioner (only at the time of discharge) in any collection district in which no commissioner had been appointed. (Of this second provision there is more said below in the discussion of master's powers.)

The first function here was greatly changed in the 1930's. The added functions of commissioner were then, and are now:

- (1) issuance of continuous discharge book or a certificate of identification to each seaman (option in the seaman)
- (2) examination of the above credential for each seaman signed on before a commissioner
- (3) making entry, on discharge of a seaman, in the

continuous discharge book or issuance of a certificate of identification

- (4) forwarding, for the keeping of central records in Washington, D.C., of records of each book or certificate issued under (1) above and of each entry made or certificate issued under (3) above.

It must be noted that the general supervision of enforcement of this section is in the Secretary of Commerce as supervisor of the BMIN (Commandant, as successor in that capacity).

The text of the U.S. Code may do a disservice here. Apart from references to Customs officials, whose position vis a vis the functions is discussed below, the editors have used in connection with the issuance of continuous discharge books and certificates of identification only the term "Coast Guard officials to whom the duties of shipping commissioner have been delegated." This is everywhere else used, as has been pointed out, in place of the statutory term "shipping commissioner." But in the statutory text at this point the vesting of authority is not in the shipping commissioners alone. In addition to the alternative vesting in Customs officials when no shipping commissioner has been appointed, there is also a vesting in "local inspectors of steam vessels" when there is no shipping commissioner. This alternative has been omitted from the Code, probably on the theory that since the local inspectors had likewise been abolished and their functions transferred to the Commandant it would be superfluous to recognize that the Commandant had two possible courses of action open to him:

- (1) appoint a shipping commissioner, in which case his presumably appointed "inspectors" could not act, or
- (2) not appoint a shipping commissioner in which case his presumably appointed inspectors could act.

This, in ordinary course of events, would be an unimaginable speculation with no conceivable application in reason. Unfortunately, it creates or at least suggests a possibility that must be explored later.

One thing is important here: that the function of maintaining central records for seamen was not a function of the shipping commissioners, as was implied at the Hearings cited, but was a function of the BMIN, with the commissioners merely required to forward the raw material which they created on shipment and discharge.

Two functions of the commissioner created by independent "statutes at large" can be identified. One, initially conferred by an Act of 1886, is to function at the shipment and discharge of seamen on vessels in the "coastwise trade..." (vessels exempted from the provisions of R.S. 4508) in, generally speaking, the same fashion as they function with respect to vessels governed by R.S. 4511. These powers and duties may be carried out, at present, only when the master or owner of a vessel so requests. Any disposition of functions for R.S. 4511 vessels must apply to operation under these provisions. 46 U.S.C. 563, 646. The other (Act of June 26, 1884, as amended; 46 U.S.C. 599) is to supervise and approve the making of allotments by seamen from their wages. The application of this law has been quite confused. The Coast Guard has long held, for certain plausible reasons, that allotments cannot be lawfully made in, say, the "coastwise trade," but only in cases where the shipping agreements must be signed before a commissioner. This has been held despite the fact that the law is specifically applicable on its face to foreign vessels in U.S. ports. To avoid the confusion, it is best to consider it here only in respect to voyages covered by R.S. 4511 ("foreign" and "intercoastal," generally). Whether allotments can be preserved will be discussed below.

The meaning of the prohibition implied in the limitation on expenditure is open to debate. In the context of the testimony at the hearings cited it might be simply that 32 "positions" are eliminated. It might be that the most noticeable function, that of overseeing the "signing on" and "signing off" of certain crews, is the only thing affected. On the other hand the only language used in the bill is "pay and administrative expenses in connection with shipping commissioners." There are however, alternatives already provided in the law which must be explored.

There is an overall vesting of authority in collectors of customs and deputy collectors of customs to perform shipping commissioner functions. It is in R.S. 4503 (classified to 46 U.S.C. 543). It is from section 8 of the 1872 Act. It is mandatory. When there is no shipping commissioner appointed at a port, the business of that officer "shall be conducted" by the named customs official for that port. If the statute is updated to refer to the lack of a person at a port to whom the Commandant has delegated the powers of shipping commissioner, it seems still necessary to read the reference to customs personnel as though R.S. 4501 (46 U.S.C. 541) had not been repealed; i.e., the duty could devolve on such an officer only at a port of entry which is a port of ocean navigation. If lack of power to appoint a commissioner because funds are denied brings about a situation in which the customs official must act, the statutes are literally

carried out. However, the intent of the appropriations limitation would be frustrated if, presumably through oversight, Congress had merely directed that the work be done by another official in another department financed by a different appropriation. It must be concluded that resort to R.S. 4503 is not a legitimate solution to the problem.

(Apart from the expectable anguish of Treasury at the hint of such a duty, there is also the fact that the collectors, like the commissioners themselves, were abolished by reorganizational activity outside of "Act of Congress.")

Justification for this can be seen in the language of R.S. 4503, itself. If a collector of customs is "deemed a shipping commissioner" he must be understood to be a shipping commissioner for whom Congress intends no funding from the Coast Guard or any other source.

At this point it is well to look at the "non-1872" function of issuance of certificates of identification and continuous discharge books. This was a new function for the commissioners, with a special authorization for customs personnel to act when there is no commissioner. As to customs, the rationale, with respect to R.S. 4503 must be carried over; there is no substitution possible. However, the reference here to "local inspectors of steam vessels" brings in a new element. It is true that under the statutory language the inspectors could function (like the collectors) only when there was no shipping commissioner. In fact, since the reorganization, the persons roughly identified as "shipping commissioner" do not issue those documents. In a sense, they are now issued by "local inspectors" even in ports where there are "commissioners." This necessitates a look at the actual delegations now in force, legally or de facto.

The one firmly established fact is that all "shipping commissioner" powers were vested in 1946 in the Commandant. Despite other shufflings, they still are, effectively, today. Similarly, all powers of the local inspector, supervising inspectors, traveling inspectors, and the boards and director of BMIN are lodged in him. No one can exercise a power without a delegation from him. The delegations leave something to be desired.

The practice in this area is affected by two attitudes. One involves a tendency to merge powers; that is, if two different bodies of law are assigned to the same administrator for execution, or if two distinct powers under the same law are these powers among delegates and a use of an authority under one to effectuate a purpose under another. The other attitude, easily understood, is that the military organization of the Coast Guard enables a performance of acts under a "by direction" theory rather than "by delegation."

Specific delegations by the Commandant are few in number. The first to be seen in the area of interest is at 33 CFR 1.01-1. "Final authority" is delegated, with respect to most Coast Guard functions generally, to each District Commander, within his district. The enumeration of specifics (along with the authority to subdelegate) appears to exclude the function in question. However, at 46 CFR 1.05(a), the paragraph "(1)" describes the Chief, Merchant Marine Safety Division as having the power, under the District Commander, "to direct" activities relative to "shipment and discharge of seamen" among other functions. In (b) at this section the descriptive language says that an Officer in Charge, Marine Inspection, "has been...delegated to give immediate direction to...activities relating to...shipment and discharge of seamen". Now, back at 33 CFR 1.01-20, it is said that an Officer in Charge, Marine Inspection, has "final authority" with respect to "shipment and discharge of seamen." It appears then that the one definite delegation from the Commandant in this area of "shipping commissioner" functions is to the several "Officers in Charge, Marine Inspection" under some form of supervision by intermediate authorities with no vesting of the actual function in those authorities by a delegation.

At one time the Commandant designated specifically officers as "Senior Shipping Commissioner" at certain ports. Given a direct delegation to the OCMI, this designation could be no more than, possibly, "Chief Deputy Shipping Commissioner." Unlike the handling of authority to function under R.S. 4450, there is nowhere in the regulations a constituting of anyone today as "shipping commissioner" nor an authority for an OCMI to delegate to individuals the power to act as commissioner. (It is likely that the instruction which gave notice that the practice of designating Senior Investigation Officers, Shipping Commissioners, and Inspectors-Personnel by the Commandant would be discontinued also authorized the OCMI to make such designations, but formal Federal Register action has never been taken.)

The regulations address the function of shipping commissioner in a few places. In 46 CFR 14 it is assumed that "shipping commissioners" are in being and the term is used as an alternate to "Officer in Charge, Marine Inspection." (46 CFR 14.01-10.) As the processing of shipping agreements is outlined, the term "shipping commissioner" is used with the accompanying "Collector or Deputy Collector of Customs at ports where no shipping commissioner has been appointed." This echoing of the statutory language gives notice that the facts that the Officer in Charge, Marine Inspection, is, if anyone is, the shipping commissioner, and that there is no "port" at which there is none appointed, have been overlooked.

A similar treatment is given in 46 CFR 15 relative to allotments of seamen. In both of these "parts," however, there is only description, no delegation.

In 46 CFR 16, there is probably a delegation (of powers under the Act of June 25, 1936; functions set out at 46 U.S.C. 643, 672, 672a, and 673) but it is a delegation to already existing "shipping commissioners" who are assumed to be.

What can be observed in fact is that an Officer in Charge is vested with the powers of the former local inspectors and of the shipping commissioners and that he has a force available to him, whatever the technicalities of their vested authority, to do certain things. Chiefly in point, however, is that his authority to issue certificates of identification and continuous discharge books is not carried out by officials who are called shipping commissioners but by officials who function as (or under) a "Senior Inspector-Personnel." It might be said that in legal contemplation the OCMI is performing, as successor to "local inspector of steam vessels," a function of "shipping commissioner" which the former local inspector could undertake only when there was no shipping commissioner for the port. If the appropriation proviso is rigorously construed it would appear that the issuance of continuous discharge books would have to be discontinued; the alternate use of the successor to the local inspector would have no more support in the statute than the alternate use of a collector of customs.

This would be a grave situation. Not only has the process of issuance been altered by administrative fiat, the substance of the statutory object has been changed also. In the consolidation of his powers from the various statutes, the Commandant has also consolidated the certificate of service (issued by the local inspectors) under 46 U.S.C. 672 with the certificate of identification (issued by the shipping commissioner under 46 U.S.C. 643). The "merchant mariner's document," in lieu of both, is now the object issued, and the continuous discharge book has been so well hidden that it is practically (except for older issues) non-existent. At this point an interpretation must be placed on the effect of the proviso. There is no clear intent discernible that the certificate in question was to be eliminated. The parallel creations in the Seaman's Act of 1936 demonstrate that the existence of one certificate implies the existence of the other, especially since the classes of vessel and the seaman thereon are the same. Since one certificate is clearly unaffected by the proviso, it holds the other in being contra the more general, incidental act which would abolish it.

A second alternative for shipping commissioners generally may also be found in the statutes. First, in R.S 4504 (46 U.S.C. 5461, derived from a provision of the original 1872 Act,

there are three separate statements. The first merely prohibits the false personation of a commissioner, the second is a puzzle: in declaring that nothing in title 53, Revised Statutes, prohibits certain persons from performing the functions of commissioner "under this title," it excepts from the permission indirectly granted the masters et al. of vessels on certain voyages. Since the voyages spelled out are precisely those and only those as to which a commissioner had a relationship under that title the result is possibly meaningless. However, the last sentence applies, in its grant, to the master "of any vessel," which of course includes the vessels which are required to utilize the commissioner.

The authority attaches when a master "shall engage his crew, or any part of the same, in any collection district where no shipping commissioner shall have been appointed..." It has been concluded above that the legal situation under the proviso will be that "no shipping commissioner will have been appointed." The situation of the master thus is covered. He is authorized to "perform the duties of such commissioner." This authorization can be construed only to extend to the duties of a commissioner relative to the shipment of the seaman, not to their discharge. There are two reasons for this conclusion. One is that the sentence just before specifically authorizes some people to perform the functions "under this title." The instant authorization omits the generalization "under this title." It speaks only of the circumstances of engaging a crew. R.S. 4549 (46 U.S.C. 641) dealing specifically with discharge in the United States requires that the discharge must be before a commissioner unless "some competent court otherwise directs" and there is a penalty for an improper discharge. On the strength of this, then, it can be said only that a master can lawfully engage a crew and commence a voyage covered by R.S. 4511; it does not authorize action and the termination of the voyage.

Whereas R.S. 4551 had originally dealt only with the certificate of discharge to be issued by a master (one item in the process of discharge and payment of wages in R.S. 4549-4553), the 1936-37 amendments completely altered its character. Not only did they create the identifying documents for seamen (for all kinds of purposes and voyages), they dealt specifically with matters even on shipment of seamen at the commencement of a voyage. The application is universal rather than only to the discharge process. Subsection (h) of this section appears to provide an applicable procedure for discharge. The first clause deals with the case of shipment and discharge by an officer of customs when there is no shipping commissioner. The second clause, in its context and in its original intent, applied to

the cases of vessels which were not subject, ever, to the "Shipping Commissioner Act," especially the "shipment and discharge before a commissioner" rules. However, the language used in authorizing a master to perform certain functions, is this:

"...where vessels are not required to sign on and discharge the crew before a shipping commissioner..."

The case of the first clause has been covered above in discussing collectors of customs. The situation is one in which there is no government official to perform as shipping commissioner. It cannot be said that the law requires the master of a vessel on a voyage covered by R.S. 4511 to achieve an impossibility, especially an impossibility brought about by Act of Congress. Thus, legally, the vessel becomes one "not required to sign on and discharge the crew before a shipping commissioner."

In such a case the statute is mandatory; the master must perform the duties set out in subsections (d) and (e). Subsection (d) covers the entry of records in a continuous discharge book and (e) covers the issuance of certificates of discharge to those who have not opted for books.

The result to this point is that the master may sign on the crew (must, in practical effect), with "signing on" including the function of verifying the identity of a seaman under subsection (b) of R.S. 4551, and he must "sign off" the crew to the extent of issuing discharges and making entries in discharge books. Some functions of the commissioner are still not accounted for.

In particular, the function of forwarding records of discharges to the BMIN (Commandant) is not yet shifted elsewhere from the shipping commissioner. Subsection (1) of R.S. 4551 may be of use here. It applies to the master of every vessel (subject to the section) whose crew is not "shipped or discharged before a shipping commissioner." In original context, the provision may have contemplated only those cases in which the use of a commissioner was not required, but, unlike the working of subsection (k), even the "required" is not used here in (1). It is sufficient if in fact the seamen are not shipped before a commissioner. The vessels we are concerned with will be, or course, in fact vessels for which the crews were not shipped before a commissioner and the obligation to provide the information specified will fall on the master. The net effect of this will be that a master of a vessel on a "foreign" voyage will be required to "sign on" and "sign off" his crew under 46 U.S.C. 564-566 and 46 U.S.C. 643(c), (d) and (e), and to file reports under 46 U.S.C. 643(1).

Assuming the validity of the position that in the absence of shipping commissioners (i.e., U.S. government officials authorized to perform the function of...) a master of a vessel subject to R.S. 4511 (46 U.S.C. 564) may perform the functions, the fact that the grant is merely permissive is not fatal. Since he may do it, he has no excuse not to do it, and if he wishes to commence a voyage he either must do it or sail in violation of law.

It seems obvious, however, that not all the duties of a commissioner can properly be permitted to a master's performance. The provision for arbitration in 46 U.S.C. 651 comes immediately to sight as a function of the commissioner that a master could not perform. The concept of a master authorized to make a conclusive ruling on a dispute between himself and a seaman appears absurd. This was not a matter of later legislation overlooking an earlier-laid trap. Both the arbitration and the authorization of the master stem from the 1872 law. There will be no effective provision for arbitration before a government official. Little, if anything, will be lost because it is believed that not more than one such arbitration has been sought since 1946. The seaman will have, of course, his opportunity for recourse to district court, even if the existence of unions is overlooked.

The allotment law will create a problem. While the Coast Guard position that no allotments are authorized in the Great Lakes and "coastwise" trades has always been of doubtful validity (and has been, it is understood, blithely ignored on the Lakes), there can be no doubt that as long as [46 U.S.C.] 599 is on the books seamen will not be allowed to make allotments on foreign and intercoastal voyages since no allotment on such voyages is valid unless executed before a commissioner. Unlike the Great Lakes instances, both masters and seamen may be wary of entering agreements for allotments, since they will not be merely extra-legal, or not covered by law at all, but affirmatively declared invalid.

While the application of the laws on deceased seamen's wages and effects will be, in effect, completely nullified by the disappearance of commissioners, the total situation is not necessarily disaster. At present there is no special law on the matter at all for seamen in the coastwise or "nearly foreign" or Great Lakes trades, yet the absence of law has not caused any great furor. It seems unlikely that there will be grave difficulties if masters on foreign voyages find themselves with no prescribed procedure to govern them. The one real problem might be in the case when a master insisted on putting the burden on a consul who would be left literally "holding the bag." It is worth inquiry into the number of instances in which in the last 20 or 50 years a consul has

formally communicated with a shipping commissioner under the statutes.

Unlike title 52 of the Revised Statutes, title 53 has no section conferring general rule-making power, and most of the laws dealt with above do not contemplate "regulations." The statutes themselves apply directly to the persons who are bound by them. Most of the "regulations" mentioned above are not truly "regulations," but, are either descriptions of performance of functions (which might have been issued in "manuals") or reminders to masters of duties imposed by statute. In the void of "no commissioners" without a change in substantive law it would probably be best to issue Federal Register notice nullifying the purported regulation of commissioners' functions and spelling out for masters the duties which have descended on them by operation of law. Paragraphs 28-34 above contain the substance of those duties which must now be undertaken by masters of all vessels on foreign voyages (Except those to Canada, Mexico, and the West Indies) or on intercoastal voyages.

G-LMI memo of 7 November 1979 to G-L.

MARAD/COAST GUARD AUTHORITY CONCERNING SHIP POSITION LOCATING SYSTEMS

Currently, The Maritime Administration (MARAD) administers a vessel reporting system, the U.S. Merchant Vessel Locator Filing System (USMER), under authority of the Merchant Marine Act of 1936, Section 212(A), as amended by the Act of 25 June 1956, c.437, 70 stat 332 (46 U.S.C. 1122a) and by the Act of 7 September 1950, c.906, 64 stat 773 (46 U.S.C. 1281 et seq.) [The authority to impose reporting requirements under the latter act expired on 30 September 1979. See, 46 U.S.C. 1294. However, informal contact with MARAD has revealed that an extension of this authority currently is being sought.] MARAD requires all U.S. flag merchant vessels of 1,000 gross registered tons and over engaged in the foreign commerce of the United States and not operating under the control of the Military Sealift Command, and non U.S. flag vessels that are covered by a "war risk" insurance finder issued by the U.S. Government, to submit USMER reports.

The Coast Guard operates the automated Mutual-Assistance Vessel Rescue System (AMVER), in which participation is voluntary for the merchant vessels of any nation, including the United States. It has been proposed by COMLANTAREA to replace the USMER system with a mandatory AMVER system. The question posed upon the conclusion of the preliminary meeting of 6 September 1979, is whether the Coast Guard legally may require reporting by the same vessels as currently are required to file reports within the USMER system.

The Coast Guard does have authority under three acts to require vessel reports, but this authority is of a limited nature. The Ports and Waterways Safety Act, as amended by the Port and Tanker Safety Act of 1978 (33 U.S.C. 1221 et seq.), authorizes the requiring of "prearrival messages from any vessel, destined for a port or place subject to the jurisdiction of the United States, in sufficient time to permit advance vessel traffic planning prior to port entry." 33 U.S.C. 1223(a)(5). The Act of 15 June 1917, c.30, Title II, Section 1, 40 stat 220 (50 U.S.C. 191), as implemented by 33 CFR 124, requires, with certain exceptions, the master or agents of every registered vessel of the United States, and every foreign vessel arriving at a United States port or place from a port or place outside the United States, or any such vessel destined from one port or place in the United States to another port or place in the United States, to give at least 24 hours advance notice of arrival to the Captain of the Port at every port or place where the vessel is to arrive. Finally, the Tank Vessel Act, R.S. 4417a, as amended (46 U.S.C. 391a), is applicable to tank vessels and authorizes the issuance of regulations requiring jurisdictionally subject vessels to provide data for a "marine safety information system," 46 U.S.C. 391a (16). These acts, taken singly or together, do not provide the statutory authority you seek. I am unaware of any other statute which could be construed to provide the Coast Guard with this authority. Therefore, I conclude that the Coast Guard currently does not have the statutory authority to implement a mandatory reporting system equivalent to USMER.

I understand that you might request MARAD to amend its regulations so as to provide for a mandatory AMVER system. The vessels currently required to report in the USMER system would be subject to the amended regulations. Because any such regulations have yet to be drafted, I believe it would be premature, at this time, for me to comment upon them. Should the process of preparing amended regulations actually be undertaken, I shall be prepared to address their specifics at that time.

G-L memo 16122 of 26 November 1979 to G-O.

COASTWISE TRADE; CHARTER OF FOREIGN BUILT VESSEL TO U.S. GOVERNMENT

You have asked several questions concerning the contemplated purchase of a Norwegian built vessel. In answering the questions we are, of course, proceeding on the presumption that you intend to place the vessel under U.S. flag.

Your first question related to whether the vessel could be employed in the coastwise trade if it were either bareboat or

time chartered to the U.S. Government. The Coast Guard role in issues relating to the coastwise trade is one of determining whether, in issuing a document to a vessel, an endorsement limiting the use of the vessel must be placed on the document. In the case of a foreign built vessel such as you describe, any document issued to the vessel would have to bear an endorsement reciting that the vessel is not entitled to engage in the coastwise trade by virtue of having been built foreign. This is required by the Act of July 2, 1935 (46 U.S.C. 883) and would be placed on the document regardless of whether the vessel's owners intended to charter it to the U.S. Government, either on a time or bareboat basis. In view of the responsibilities of the U.S. Customs Service for regulating the coastwise trade and enforcing the coastwise laws, you would have to consult with that agency for its policy relating to whether vessels with restrictively endorsed documents may trade coastwise when chartered to the U.S. Government.

You were also concerned with the applicability of the vessel inspection laws to the vessel. In the first instance, it is necessary to note that a vessel may not normally receive a register, license or enrollment until it has received a certificate of inspection, 46 U.S.C. 496. The mere fact that a vessel may later be chartered to the government, either on a time or bareboat basis, does not exempt a vessel from this requirement or from the inspection laws in general. Under certain limited circumstances, the requirements for inspection may be waived.

G-LMI ltr of 3 December 1979.

VESSELS SERVICING OFFSHORE PRODUCTION PLATFORMS

Your letter of 21 September 1979 concerning jurisdiction over vessels which are permanently on station around a gas production platform some 32 miles off the coast has been referred to me for reply. You state that under New Zealand law this vessel is not in your "home trade," which I assume means that the vessel is not required to be of New Zealand registry. Therefore, the vessel is not subject to the various New Zealand registry laws regarding survey, manning, etc., which apply to vessels of New Zealand registry. You requested information on how the United States treats similar type vessels.

Under United States law and interpretations by the U.S. Customs Service vessels which service offshore production platforms and which never call at a port of the United States or another offshore platform on the United States Outer Continental Shelf are not in "coastwise trade" and therefore are not required to be registered under the U.S. flag. If

not U.S. flag, these vessels are likewise not subject to the full range of the survey and manning laws of the United States. However, certain laws mainly relating to pollution prevention, may apply to these vessels. The primary one is the Federal Water Pollution Control Act, as amended. In addition, certain sections of the Outer Continental Shelf Lands Act, as amended in 1978, might apply, particularly sections 21, 22 and 30.

G-LMI ltr 16710 of 28 November 1979.

SURRENDER OF VESSEL DOCUMENTS; RENEWAL OF LICENSES;
PENALTIES

[You] questioned whether a penalty attaches to a failure to surrender the expired license of a vessel which is no longer to be used in an activity for which a license is required. The basic considerations expressed in setting the background are correct, in that no owner is under compulsion to renew a license on its expiration, any more than he was under compulsion to obtain documentation for his vessel in the first place, and that he has the alternatives of engaging in other lawful but "unlicensed" enterprises or, if he will, operating illegally under pain of some other penalty. The general problems created by the age and language of the laws and the complexity of the ruling-regulation development in practice are recognized, but the attempt to resolve all the connected difficulties will not be made here.

To confine attention to the narrow issue presented, it seems necessary to look to the intent of the statutes. Certain ambiguity cannot be overlooked. R.S. 4325 (46 U.S.C. 267) does, on cursory reading, appear to order renewal of each issued license in timely fashion on its expiration. This interpretation must, for a variety of good reasons, be rejected. Further, the statute somewhat confusingly uses three different phrases for the actions concerned: (1) "present" for renewal, (2) "surrender," and (3) "deliver." It might be argued that to "present for renewal," clearly distinct from an act of surrendering, is not technically a "delivery" and thus not within the penalty clause. On the other hand, it is also arguable that the presentment involves a delivery even though there will be a return to the deliverers.

The language of the Revised Statutes, as enacted, gives a clearer picture. R.S. 4325 and R.S. 4326 (46 U.S.C. 267 and 268) were both derived from section 9 of the Enrollment Act of 1793. As enacted there, the section comprised only two sentences, the second of which is substantively what is now the second and last sentence of 46 U.S.C. 268. The first established a kind of unity for all the matters in §267 which

were then in the law plus the matter in what is now the first sentence of §268.

The phrasing was also significantly clearer in that one sentence, as it remained in the curtailed version of R.S. 4325. The section required that a license be "given up" in all the cases covered, equally: expiration at home port, expiration away from home port, and sale outside the home district. The penalty clause read: "...if the master thereof shall neglect or refuse to deliver up the license..." There can be no doubt here that "to deliver up" is synonymous with "to give up," and that the penalty is applicable to all situations.

Under this view it is seen that what was the principal concern of the lawmaker was the accounting for the certificate, not, in the one instance, a penalty for tardiness in renewing, which you see as a possibly unjustifiable attitude. The important thing was the repossession by issuing authorities of a certificate which could easily lend itself to improper purposes. Under this reading, authorized because of the ambiguity, in light of the long existing definite requirement that licenses no longer legally usable be recovered by the issuer, the decision of an owner not to renew a license does not excuse the non-surrender of the expired certificate.

In this connection, one element of the regulation cited on the renewal process is interesting. The "Subpart" in which 67.31-1 appears is captioned "Requirement for renewal." The predecessor regulation of BMIN, prior to transfer of functions to Customs, had no "subpart" designations; the "Part" on documentation of vessels ran consecutively from 1.1 through 1.65. Section 1.31 was, indeed, captioned "Renewal of license." But both the old and the current share one thing, the captions being disregarded. Paragraph (a) of the BMIN regulation declared:

"A license granted to any vessel must be presented to the collector of the district ... within 3 days after its expiration ... if the master fails to deliver the license, as herein required, he shall be liable to a penalty of \$10, which shall not be mitigated." (CFR, 1st edition)

Paragraph (a) of 67.31-1, with some elaboration and without the penalty reference, is to the same effect. Both require the "presentment" of the document without words referring to any purpose of renewal.

It may be that the imposition of "Code of Federal Regulations" format on administrator's edicts has served to obscure the scope or intent of the pronouncement. It is

especially clear that the earlier version represents the traditional application of the law by the administrator: an expired license must be "delivered up" or "surrendered" under pain of penalty.

It is an undoubted fact that a history of poorly placed or formulated amendments to existing law, like the consolidation of the enrollment and license, has affected the original need for some remaining obligation or the desirability of imposing them. Nevertheless, on this one point, the long observed practice of requiring the physical turning over of expired licenses is to be maintained. The penalty, it must be noted, attaches only to the master of the vessel, not to the vessel itself or its owner.

G-L ltr 16713 of 21 November 1979 to CCGDFIVE.

THE TERRITORIAL SEA IN INTERNATIONAL LAW

Thank you for your inquiry of November 20, 1979 relating to the international law which governs the regime of the territorial sea.

As you no doubt are aware, current United States practice in this area is reflective of our ratification of the Convention on the Territorial Sea and the Contiguous Zone, done at Geneva April 29, 1958, 15 UST 1606; TIAS 5639. Article I of the treaty clearly recognizes that the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty which the state exercises over its land territory. You may find the International Law Commission 1956 Commentary helpful in tracing the origin of the various provisions embodied in the treaty articles. Also of value is the discussion in O'Connell, The Judicial Nature of the Territorial Sea, 45 British Y.B. Int'l L. 303 (1971). See also the decision in Cunard S.S. Co. v. Mellon, 262 U.S. 101 (1923).

The existence of the territorial sea under international law is not fairly in dispute in light of the widespread ratification of the 1958 treaty. However, the question of the permissible breadth of the zone is one of the most contentious issues in the progressive development of the law of the sea. The subject of delimitation of the territorial sea was taken up by the International Court of Justice in the Anglo-Norwegian Fisheries Case. [1951] I.C.J. 3. The Court addressed the issue of permissible breadth, saying:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the

act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law. [1951] I.C.J. at 132.

The United States, in accordance with the opinion of the International Court and the practice of Great Britain and other countries, adheres to the doctrine of a three-mile limit on the seaward extent of a nation's territorial waters, measured from the baseline established in compliance with other provisions of the 1958 Convention. Assertions have been made both prior to and after the 1958 U.N. Conference on the Law of the Sea that coastal states might unilaterally set the breadth of their territorial seas. The conference itself was unable to arrive at a fixed distance in the Treaty itself. Some States have declared extensive Territorial Sea claims, as much as 200 nautical miles, usually related to their desire to secure jurisdiction over living resources located beyond a generally accepted 12-mile exclusive fishery Zone. This subject is exhaustively treated in the following materials: Heinzen, The Three-Mile Limit: Preserving The Freedom of the Seas, 11 Stan. L. Rev. 597 (1959); Becker, The Breadth of The Territorial Sea and Fisheries Jurisdiction, 40 Dept. State Bull. 369 (1959); Dean, The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, 54 A.J.I.L. 751 (1960). For current information on the status of claims of territorial seas of various breadths you should consult the latest revision of "National Claims to Maritime Jurisdictions," U.S. Department of State, Limits In The Seas Series. You might also find the content of various declarations illuminating in your study: The Santiago Declaration of 1952 and the Declarations of Montivedeo and Lima of 1970.

While concerns over the breadth of the territorial sea have been a major source of controversy over the years, other areas have also clamored for attention. The chief of these concerns the issue of passage through the territorial sea by ships of other states. This right of passage exists and is defined under Section III of the Territorial Sea Convention. Essentially, vessels "of all states ... shall enjoy the right of innocent passage through the territorial sea." 15 UST at 1608, article 14 (emphasis added). Article 14 also defines "passage" in paragraphs 2 and 3, and terms passage "innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Art. 14 at para 4. The 1958 convention also provides for a contiguous zone, not to extend beyond 12 miles from the baseline in which the coastal state may exercise limited sovereignty. It may act to prevent infringement of its customs, fiscal immigration or sanitary regulations or punish such infringements within the two zones

contemplated by the convention. You may wish to contrast the treaty text with the original proposal of the United States on the subject to be found at U.N. Doc. No. A/Conf. 13/C.1/L.28. Also of considerable interest is the discussion contained in McDougal and Burke, The Public Order of the Oceans, 214-69 (1962).

The authority of a coastal state vis a vis foreign warships is reflected in article 23 of the Convention. The International Law Commission in its commentary to the draft article indicated that the rules of innocent passage set forth in subsection A (Rules Applicable to All Ships) were in fact applicable to warships as well. However, arguments have been made supporting the premise that "[t]he law regarding the passage of warships is ambiguous because no agreement could be reached in 1958." Shyam, International Straits and Ocean Law, 15 Indian J. Int'l Law 17 (1975). A peculiar twist to the passage problem developed around operations by two Coast Guard icebreakers. See "The Case of Edisto and Eastwind," 57 Dept. of State Bull. 362 (1967). An extensive discussion of innocent passage by warships may be found in McDougal and Burke, op. cit.; and Whiteman, Digest of International Law, 4:344-480 (includes extensive annotations).

Currently, the Third U.N. Conference on the Law of the Sea is deliberating over the establishment of a comprehensive maritime regime which will govern these and other aspects of international ocean uses. The United States has expressed its willingness, within the context of a widely ratified and acceptable treaty to recognize the limit of the territorial sea at a maximum breadth of twelve miles. See Informal Composite Negotiating Text, Revision 1, A/Conf.62/WP.10/Rev.1 articles 3, 17-9, 24-5, 29, 30. Pending the entry into force of such a treaty, the United States recognizes no right in international law for territorial sea claims in excess of three nautical miles. The position of the United States was underscored in August of this year when various of the media carried accounts of current U.S. practice respecting extensive territorial claims. You may wish to refer to the New York Times Index for material in this vein.

In regard to certain statutes which recognize the authority of the United States beyond 3 miles from the baseline, you should note that such jurisdiction is carefully circumscribed and exercised for limited purposes only. For example, while the language of the Outer Continental Shelf Lands Act is a recognition of jurisdiction, the words convey the intent of Congress that federal jurisdiction and control extend only to the subsoil and seabed of the shelf and to artificial islands and fixed structures which are erected thereon. The

enactment explicitly disclaims, as did the Presidential Proclamation of 1945, any intent to affect the "character as high seas" of the superjacent waters. 43 U.S.C.A. 1333(a)(3). The Fishery Conservation and Management Act of 1976, as enacted, declared the intent of Congress to maintain existing U.S. ocean jurisdiction unchanged, but for the limited purpose of conservation and management of fisheries, and to continue unimpeded exercise of all other high seas freedom while encouraging efforts to obtain an internationally acceptable treaty to deal with this subject. 16 U.S.C. 1801 et seq., as amended Pub. L. 95-354, 92 Stat. 519 [1978].

G-LMI ltr 16211 of 10 December 1979.

MARYLAND PROPOSED DOT HAZARDOUS MATERIALS REGULATIONS IN FEDERAL PREEMPTION

The proposed regulations generally authorize Maryland Port Authority (MPA) Officials to board and inspect vessels to check for compliance with the proposed regulations, require vessels to comply with DOT regulations for classing, packaging, marking, labeling, and placarding of hazardous materials (these principally are the MTB regulations), require notification of certain incidents (such as fire or spillage), prohibit transporting of certain dangerous cargoes, require permits for certain other cargoes and require notice of arrival to the MPA when notice is given to the COTP under 33 CFR 124.14 (note that Part 124 has been deleted and the notification requirements moved to, and revised in, a new Subpart A of Part 161 (44 FR 63672, 5 Nov 1979)) and 126.27.

The proposed regulations appear to apply mainly to the handling and transportation of hazardous materials that are within the purview of MTB regulations under the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.). Very few of the proposals appear to be directed to bulk shipments which are under Coast Guard regulatory jurisdiction. Thus, the main impact of the proposal would be on Coast Guard enforcement efforts. I defer to the MTB for comments on preemption of the state proposal by regulations administered by the MTB. The MTB has procedures for considering inconsistency with state requirements, in 49 CFR Part 107, Subpart C.

With respect to Coast Guard responsibilities, those requirements which apply to structures or waterfront facilities would not be preempted by virtue of 33 U.S.C. 1225. Those requirements which apply to bulk carriage by vessels, within the purview of the Tank Vessel Act (46 U.S.C. 391a), would be preempted. However, it is unclear which

requirements if any, fall into this category. Some of the other requirements may be borderline, but, as proposed, they do not seem to create any major conflicts with Coast Guard requirements. Though not preempted, the notification requirement is unnecessarily duplicative of Coast Guard notification requirements. Our desire has been to minimize the number of notifications required of vessels. Therefore, you may wish to communicate to the MPA our concern about this requirement. The MPA's desire to receive notification can be satisfied by receiving notification from the COTP rather than the vessel itself.

There is an ambiguity as to whether the regulations would apply to public vessels. For instance, Navy and Coast Guard vessels are excepted from certain requirements, but are not expressly excepted from others. The State is preempted from applying any of the requirements to public vessels.

One other requirement is questionable. Though not directly affecting the Coast Guard, the prohibition from entry for certain vessels may be invalid as an unreasonable interference with interstate or foreign commerce.

Thank you for bringing this proposal to my attention. We are interested in being apprized of potential preemption issues and encourage dialogue with state and local governments.

G-LMI ltr 16616 of 3 December 1979 to MSO Baltimore.

CIVIL PENALTY - VIOLATION OF 47 CFR 83.368;
46 CFR 69.05-1

You argue, in connection with the penalty assessed for the violation of 47 CFR 83.368, that the requirement imposed by that regulation pre-dated the Vessel Bridge to Bridge Radiotelephone Act, and that consequently the Coast Guard is without authority to assess a penalty for that violation. You do not deny that the regulation was violated. On 6 June 1972 the Federal Communications Commission, acting under the authority of Section 8(a) of the Act (33 U.S.C. 1207(a)), amended 47 CFR 83.368 by adding a new paragraph (e), 37 Federal Register, 11259. This new paragraph requires that a log be maintained, including specified entries for the "bridge to bridge station required by the Vessel Bridge to Bridge Radiotelephone Act." Accordingly, by clear implication the requirement for the log with its specified entries was established by this regulation. Under authority of 33 U.S.C. 1208(b) the Hearing Officer, in accordance with necessary delegations of authority, assessed the penalty in question for a violation of that regulation. Since the regulation was issued under the Act, I find that the assessment was lawfully made. Therefore, your appeal with

respect to this violation is denied.

You argue, in connection with the penalty assessed for the violation of 46 CFR 69.05-1, that the regulatory authority provided by 46 U.S.C. 45 "does not authorize any regulations involving the manner in which [the permanent marks required by 45 U.S.C. 45] are to be painted." You do not deny that the regulation was violated. The regulatory authority "to establish and provide a system of numbering vessels" clearly includes the authority to prescribe the means by which a vessel's number be "permanently marked" so as to meet the statutory requirement. Consequently, I find that the assessment was lawfully made, and your appeal with respect to this violation is also denied.

G-LMI ltr 16713/8 of 28 November 1979.

TANK VESSEL ACT, §4417a(7)(N) OF THE REVISED STATUTES

[You] request an opinion of the meaning of the phrase "relevant international agreements to which the United States is a party" in 46 U.S.C. 391a(7)(N). This paragraph provides the Coast Guard authority to exempt certain vessels from the construction and equipment requirements in final regulations implementing the results of the TSPP Conference and section (7) of the Tank Vessel Act. Since the exemption would provide relief from certain construction and equipment requirements, in order for it to have any practical meaning it must be effective no later than the date the construction and equipment requirements must be met, June 1931 (the relevant effective date in accordance with Resolution 1 of the TSPP Conference).

The problem in meeting this effective date centers on the words "is a party" in paragraph (N). Recognizing that a strict interpretation of "is a party" would be the date the MARPOL Protocol enters into force for the United States, i.e., the date the United States ratifies the Protocol or the date the Protocol enters into force internationally, whichever is later, the following rationale would support an effective date which is not later than June 1981. (Note that the regulations providing the mechanism for considering exemptions could be in place before this date so that exemptions could be issued to be effective by June 1981.)

Clearly, section (7) of 46 U.S.C. 391a is tailored after the TSPP requirements except for the few provisions that go beyond. The version of section (7) passed by the House Merchant Marine and Fisheries Committee did not contain the exemption authority in paragraph (N). Several oil companies requested Congressman McCloskey to introduce an amendment which would provide the Coast Guard with exemption authority.

Congressman McCloskey, on June 14, 1978, requested the Department of Transportation's view on that amendment (as well as several others) and on June 22, 1978, the Department voiced no objection to the proposal. The House Committee staff paper dated August 8, 1978, which contains the amendment, explains it as follows: "This amendment simply gives the Secretary of Transportation authority to exempt vessels from the minimum requirements established in the bill for segregated ballast, dedicated clear ballast, or crude oil washing if he determines that shore-based reception facilities are adequate." The staff paper ties this authority to the relevant international agreements to which the United States is a party but then continues, "It simply recognizes that in certain trades where tankers have set loading and discharge locations, it may be much more economical and every bit as safe to use shore-based reception facilities to deposit oil residues rather than having tanks provided in the vessel for this purpose." This is the extent of the legislative history on this paragraph.

The construction and equipment requirements of section (7) have specific applicability dates. Resolution 1 adopted by the TSPP Conference recommends that the Protocol enter into force not later than June 1981. It is upon this entry into force date that the effective dates of the several construction and equipment standards is based. Paragraph (N) fits into this scheme because regulation 13C of the MARPOL Protocol, upon which paragraph (N) is based, would likewise have effect by June 1981 if the target date was met. Just as regulation 13C fits into the scheme established in the MARPOL Protocol, paragraph (N) fits in section (7). Viewing paragraph (N) this way the phrase "relevant international agreements to which the U.S. is a party" can be read principally as an identification of the international agreement which governs exemption. This document is, of course, the MARPOL Protocol. We can speculate that the "is a party" phrase was inserted with the assumption that the MARPOL Protocol would enter into force by its target date. The fact that it may not and should not destroy the overall scheme by not allowing exemptions from the construction and equipment requirements. It is not unreasonable to assume that Congress intended that exemptions would be issued if the qualifying criteria are satisfied. The criteria are contained in Resolution 13C of the MARPOL Protocol and studies developed pursuant to Resolution 16 of the TSPP Conference, and the criteria can be used without regard to the entry into force of the Protocol.

It must be recognized that the above rationale has weaknesses as it varies the plain wording of the statute. However, it is the only rationale which gives meaning to paragraph (N) in the event the MARPOL Protocol does not enter into force by its target date.

G-L memo 16700 of 20 November 1979 to G-M.

CIVIL PENALTY - VIOLATION OF 46 U.S.C. 497 & 498.

The appeal is from the action of the Hearing Officer in assessing a penalty of \$500 against the company under the authority of 46 U.S.C. 497 and 498. The assessment was based on the finding that, in violation of 46 CFR 26.25-1(c), the [vessel] was operated by a person not possessing an operator's license, on 9 April 1978.

On appeal you deny that the violation occurred. You state that a licensed pilot was on duty at the time and that the person alleged to be in physical control of the vessel was an apprentice pilot. Your appeal is denied for the reasons stated below.

Your statement that a licensed pilot was on board the vessel at the time of the violation is not a valid defense to the charged violation. Section 26.25-1(c) of Title 46, Code of Federal Regulations, requires that the vessel be under the actual direction and control of a person licensed by the Coast Guard, while the vessel is underway. The record of the case indicates that the person in physical control of the vessel at the time applied for an operator's license after the violation in this case occurred.

An exception to the license requirement of 46 CFR 26.25-1(c) is found in 46 CFR 10.16-5(c). That exception provides that a person holding a second-class operator's license may operate the vessel, provided a licensed operator is onboard the vessel. However, neither the evidence you have submitted nor the evidence in the record of the case indicates that the person in actual control of the vessel was licensed as a second-class operator. Furthermore, the record contains written statements of two Coast Guardsmen on board the vessel at the time of the violation indicating that the only company personnel on board at that time were the persons in actual control (found to not be a licensed operator) and a deckhand. This evidence directly contradicts your assertion that a licensed operator was onboard. I therefore find that substantial evidence exists in the record to support the finding that the violation occurred as charged.

G-LMI ltr 16460/2 of 28 November 1979.

CIVIL PENALTY - VIOLATION OF 46 U.S.C. 224a(5)

The appeal is from the action of the Hearing Officer in invoking penalties totaling \$600 against the company for

violations of 46 U.S.C. 224a(5). The penalties were invoked upon the findings that the company employed or engaged persons, who were not licensed by the Coast Guard, to serve on board [the vessel] as mate and engineer.

On appeal, you do not deny that unlicensed individuals were employed to perform the duties of mate and engineer. Your appeal is denied for the reasons stated below.

It should be mentioned first that although your letter of 8 December 1975 is not labelled specifically as an "appeal," the Hearing Officer treated the letter (which contained a list of objections to his decision to invoke the penalty) as if it were an appeal. The case was not forwarded for my review until this year, however, due to the pendency of United States v. Neves, which decision has been reported at 580 F.2d 985 (9th Cir. 1978), involving issues raised in your letter. The District Commander notified you, by his letter of 16 December 1975, that he was holding the instant case in abeyance pending the outcome of the appeal in Neves. Now that the "grey area" of the law (so characterized in your appeal) has been resolved by the Neves decision, the instant administrative appeal is ripe for review. My decision represents the Coast Guard's "final agency action" in this case.

Your first basis for appeal is that the company did not "knowingly" employ the unlicensed individuals. Rather, you argue, the individuals were employed by the Master of the vessel, who was acting on his own initiative. Nevertheless, the Hearing Officer in this case concluded that the Master acted as an agent of the corporation in employing these persons. In view of his dual role as both the Master of the corporation's vessel and an officer (Vice-President) of the corporation, the Master's acts in employing these unlicensed individuals must be viewed as acts of "the corporation." I believe that the Hearing Officer's conclusions in this regard are correct and proper, notwithstanding your assertion that the Master's acts were not approved by the corporation's "other principals."

The second basis of your appeal is that the company was not given notice of a hearing or an "opportunity of defense." This contention is not supported by the evidence in the record. In a letter dated 15 October 1975, you were notified of the alleged violation, and of your right to "the opportunity to provide in writing or in person, any information or material that denies, explains, or mitigates the apparent violation." Enclosed with that letter was a copy of the Coast Guard regulations which governed the penalty proceedings in this matter. A post office return receipt in the record indicates that this letter was delivered to a representative of the company on 23 October 1975.

In light of this evidence, I find that you were afforded an adequate opportunity to respond to the alleged violations.

The third basis for appeal is your contention that [the vessel] was engaged in a single "voyage" during the times listed above, and not three "voyages" as you have interpreted the Hearing Officer's letter of decision. This argument is misdirected. The statute found violated in this case, 46 U.S.C. 224a, is not limited by the term "voyage." Rather, the statute applied "to all vessels, however propelled, navigating on the high seas..." 46 U.S.C. 224a(1). I concur in the determination that "each time a vessel navigates on the high seas constitutes one period wherein a violation or violations can occur." The record indicates that [the vessel] made three distinct trips, during each of which she was "navigating on the high seas." Each period of navigation was separated from the others by a period of time in port. Thus, in my opinion, the record supports the Hearing Officer's determination that there were three distinct periods of time during which separate violations of 46 U.S.C. 224a(5) occurred in this case.

Lastly, you argue that since [the vessel] is a fishing vessel, she is exempted from minimum manning requirements. In support of this argument you cite United States v. Silva, 272 F. Supp. 46 (S.D. Cal. 1967). The Silva decision is irrelevant to this civil penalty action, however, because the issue in the instant case is not whether there was a required minimum number of crewmembers on board. Rather, the violation charged here is that [the company] employed or engaged unlicensed persons to perform the duties of mate and engineer on the company's vessel. Fishing vessels are not exempted from the requirement that only licensed personnel may be engaged to perform these duties under 46 U.S.C. 224a(5). United States v. Neves, 580 F. 2d 985. The record in the instant case contains the admission that the unlicensed persons were so engaged on [the vessel]. Therefore, the Hearing Officer's findings of violations of 46 U.S.C. 224a(5) are supported by substantial evidence in the record.

G-LMI ltr 16460/11 of 7 November 1979.

MANNING OF ALASKA FERRIES

[You inquired] about the status of "mates" (or licensed deck officers) aboard vessels of the Alaska Ferries system, with respect to 46 U.S.C. 222, 223, and 673. The route followed by the ferries, from Seattle north, [is] through "sheltered waters" with "Lakes, bays, and sounds" as the appropriate designation for inspection purposes.

In the context of the inspection and manning laws this designation excludes the application of "ocean" and "coastwise" requirements. It is noted that "mates" (a matter also of significance for "Great Lakes" routes) are authorized and created, under R.S. 4440 (46 U.S.C. 228), for "steam vessels" only on ocean and coastwise routes. It is understood that originally the certificates of inspection for those ferries called for "pilots" but that a recent change by the local office put "mates" on the certificate of inspection instead. Since "mates" of steam vessels are licensed only for "ocean" and "coastwise" this change was not in harmony with the law. If the question of authority to require "pilots" as part of a vessel's complement is troublesome, since the ferries operate in part on Canadian waters, it is enough for the time to note that the difficulty has never seemed bothersome on the Great Lakes where pilots have been regularly required in the complements of vessels operating in Canadian waters.

Since 46 U.S.C. 223 applies only to "ocean" and "coastwise" vessels, and since the instant route is, as a premise, neither, neither the three "mate" provision nor the watch requirements of the statute apply. Similarly, since the route of the ferries has been determined by the administrator as being within the exceptions to the application of 46 U.S.C. 673 that statute does not apply either.

The result is that under 46 U.S.C. 222, the vessel's certificate of inspection may require such complement of licensed deck officers (masters and pilots only) as may in the sound exercise of judgment be necessary for safe navigation.

It seems inevitable that one licensed master would be in fact required. It would be discretionary to require one, two, or three (or more) licensed pilots. It has been mentioned that the current practice, in addition to specifying a number of "mates," also places on the certificate of inspection a dictate that these mates must stand "X equal watches." This practice is not authorized under law. Even in the "three mate" statute, what the inspectors are required to put in the certificate of inspection is the number of mates required to be on board. Under 46 U.S.C. 222 the certificate is to state the "complement" to be had on board and in the service of the vessel. The remedy for violation of the certificate in this respect, when it is found that a vessel is navigated without "the number and class of licensed officers" required, is withdrawal of certification. It must be noted that the remedy is not available for apparent misuse or misassignment of those on board, only for not having the required persons on board.

The watch division laws operate directly on the master of the vessel; the limit of the agency's power is the requirement that there be aboard at least those necessary to allow the division into watches.

It follows that, however many pilots are required aboard an Alaska Ferries system vessel, since neither 46 U.S.C. 223 nor 46 U.S.C. 673 applies, there is no statutory requirement for division into watches, and there is no authority to make requirement for such division on the certificate of inspection. A master, in such cases, may, at his peril, establish a one, two, three, or four watch system without statutory violation. In the event, however, the master could well be held liable in any of several other fashions, for failure to utilize his crew in consonance with good, customary practice.

G-LMI memo 16712 of 1 November 1979 to G-MT

SUSPENSION AND REVOCATION PROCEEDINGS; DETERMINATION OF INCOMPETENCY

[It was suggested] that the case involved be remanded to the Administrative Law Judge for an evaluation "which comports with the requirements of the USPHS Operations Manual." That Manual is quoted in [the] reference: "The final decision as to fitness for sea duty shall rest with the Chief Medical Officer, U.S. Coast Guard." [The] reference also points out that another case was disposed of at hearing, by dismissal of charges by the administrative law judge, in accordance with such a "recognized procedure." I am concerned that there appears to exist a complete misconception of the legal status of the agency in this area.

It is well to set down flatly that under the terms of the statutes underlying, and the delegation of authority with respect of them, the Commandant of the Coast Guard is "the agency." No person functions in the area by any vesting directly by the statute but only under delegation by the Commandant. Here also, it must be pointed out, there is a great difference between "delegation of authority" and assignment of a staff function.

The administrative determination of a seaman's fitness for duty is not a function of the Public Health Service but of the Commandant of the Coast Guard. The administrator of the Public Health Service cannot vest in or delegate to anyone the authority to make such a determination. The functions of the Commandant's staff are described in 46 CFR 1.01. Thus, it is improper to speak, as [the] reference does, at paragraph 4, of a "formal decision" of a member of the Commandant's staff. The staff members are advisory to the Commandant, not "decision" makers.

The procedure followed in the case was legally improper. In the first place, the administrative law judge, possibly misled by the purport of the Public Health Service manual, misconceived his own function. He functions only by delegation of authority from the Commandant. He does not sit in judgment on the decisions of the Commandant. [He apparently believed] that he was entitled to a "judgment" of the Commandant's Chief Medical Officer, upon which he would then pass judgment. In effect, he was attempting to make the Commandant an "agency-party" before him much as an agency is a party to a civil action brought by an aggrieved person in a Federal Court. As an employee of the agency, an administrative law judge has no such power.

It is true that an administrative law judge is not bound by a medical opinion (especially one of "fitness for duty") in a case properly before him. Such an opinion is evidence, no more. If an administrative law judge needs guidance from the Commandant the regulations clearly give him the opportunity to do so. 46 CFR 5.20-1(b). But a member of the staff of the Commandant is not an advisor to the Commandant alone. The matter should not have been referred to "G-K" for an "opinion" at all. The administrative law judge was bound to make [a] decision on the record before him. If he could not, for some good reasons, make an initial decision on the record, he could refer the matter to the Commandant for decision, but this is a different course from the one that was followed.

It is unfortunate that the matter was not, at the proper time, referred for an analysis of the legal considerations involved. The procedure there followed was legally incorrect and is not to be held out as a precedent for the handling of other incompetency cases.

G-LMI memo 16722 of 20 December 1979 to G-M; G-CJ.

FWPCA CIVIL PENALTY - "UNIVERSITY" HELD TO BE "PERSON" UNDER
FWPCA

The sole question presented in the instant case is one of jurisdiction; i.e., whether the University is a "person" subject to the civil penalty provisions of 33 U.S.C. 1321(b)(6). The facts upon which the Hearing Officer found that 33 U.S.C. 1321(b)(3) was violated are not in dispute.

The term "person" is defined at 33 U.S.C. 1321(a)(7) as including "an individual firm, corporation, association, and a partnership." The Hearing Officer in this case, relying upon a prior opinion in an analogous case (Coast Guard Law Bulletin No. 412, p. 16) found that the University of Minnesota was a "corporation" and thus subject to civil penalty liability under 33 U.S.C. 1321(b)(6). On appeal, you

have questioned the Hearing Officer's jurisdictional finding in light of an earlier agency opinion (Coast Guard Law Bulletin No. 409, p.12) which states that certain public corporations may be exempt from such civil penalty liability. You are correct in asserting that the two Law Bulletin opinions can be interpreted inconsistently with respect to their treatment of "public corporations" as "persons" subject to 33 U.S.C. 1321(b)(6). The earlier opinion (Law Bulletin No. 409) was published, however, during the infancy of the Coast Guard's FWPCA enforcement program, and was quickly superseded by the opinion in Law Bulletin No. 412. The basic rationale underlying both opinions was that "the definition of 'person' as used in section 311 of the Act should be given a broad interpretation in order to carry out the stated purpose of section 311," (i.e., "...it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States...." 33 U.S.C. 1321(b)(1)) (Emphases added.)

The latter opinion referred to above (Law Bulletin No. 412) sets down what you characterize as a "corporate existence" test for determining whether an entity is a "person" subject to 33 U.S.C. 1321(b)(6). More specifically, the test is concerned with the separate corporate existence of the entity and its relative autonomy from governmental control. In the instant case, the record establishes that the University was created as a distinct entity, to enjoy the benefits of its legal status as a corporation, and to be free from external control by the executive, legislative and judicial branches of the state government. The Minnesota Supreme Court has stated that the University is analogous to a private corporation in that the entire control and management of its affairs and property has been conferred upon the governing corporate body of the University - the Board of Regents. State v. Chase, 175 Minn. 259, 220 N.W. 951 (1928).

Given the autonomous corporate nature of the University, and in view of the stated purpose of section 311 of the FWPCA, I find that the University is a "person" within the meaning given to that term by 33 U.S.C. 1321(a)(7). To the extent that the opinion expressed in Law Bulletin No. 409, at p. 12, can be interpreted as inconsistent with the decision in this case, that earlier opinion is to be disregarded. I find further that the Hearing Officer's determination that the University violated 33 U.S.C. 1321(b)(3) is supported by substantial evidence in the record, and his decision with respect to the amount of penalty to be assessed was neither arbitrary nor capricious. Accordingly, the civil penalty assessed by the Hearing Officer is affirmed.

G-LMI ltr 16460/2 of 6 December 1979.

PWPCA CIVIL PENALTY - DUE PROCESS UNDER REVISED REGULATIONS

With respect to your assertion that your client's due process rights were violated, you argue that it is unlawful for the Hearing Officer to conduct a preliminary examination of the investigation case file material. You state that this preliminary examination "prevents the vessel from having a fair opportunity to exclude or expunge objectionable evidence prior to its submission to the fact finder." (The preliminary examination is provided for in 33 CFR 1.07-20.) While you have not attempted to make any specific showing of prejudice against your client in this case, I believe your argument is deserving of a brief explanatory response. First, the regulations governing Coast Guard civil penalty proceedings were recently revised (43 FR 54186, 20 November 1978). The revision was perceived as necessary because of the Coast Guard's broadening responsibility in enforcing a wide spectrum of federal laws. It is the intent of these revised regulations that, to the extent possible, the rights associated with the concept of due process and a fair and impartial hearing will be accorded to all persons charged with infractions for which a civil penalty may be assessed. These rights are provided to protect the interests of the alleged violator as well as those of the public. However, hearings under 33 CFR 1.07 "may still be conducted in an informal atmosphere with the maximum degree of flexibility consistent with the need to have an orderly framework and a record of what was done during the administrative process." [43 F.R. 54186]

In developing these penalty procedures, consideration was given to a number of factors, including: the need for a simple procedure which is understandable and in which a citizen can afford to participate; the desire to provide the alleged violator with procedural rights which are consistent with the sanction being considered; the fact that penalties are normally only pecuniary in nature; and the need of the agency to be able to administer a case load numbering in the thousands. To these ends, 33 CFR 1.07-20 provides that a preliminary examination of the investigative case file may be made by the Hearing Officer to determine whether there is sufficient evidence to proceed, and/or whether there is any reason which would make penalty action inappropriate. Under this procedure, many cases may be dismissed administratively with a minimum of expense and inconvenience. Thus, this preliminary review is primarily for the benefit of the alleged violator. If civil penalty action is pursued, on the other hand, and if the case file contains something the party charged considers objectionable, that fact may be presented to the Hearing Officer. While the Hearing Officer is not bound by strict rules of evidence, he must give due consideration to the reliability and relevance of each item

of evidence. 33 CFR 1.07-55(d). If the person charged considers anything in the investigative case file unreliable or irrelevant, an argument to the effect may be made, and the Hearing Officer is bound to consider that argument. Finally, if the person charged believes that evidence in the record was improperly considered by the Hearing Officer, he may present this as a proper basis for appeal. In my opinion, the regulations contained in 33 CFR 1.07 provide for hearings which are fair and which are consistent with the needs of due process. Your attention is directed to the recent opinion in U.S. v. Independent Bulk Transport Co., Inc., [578 Civ. 1482 (S.D.N.Y. Oct. 15, 1979),] which upheld the Coast Guard civil penalty procedures.

G-LMI ltr 16460/13 of 19 December 1979.

FWPCA CIVIL PENALTY - EFFECT OF FAILURE TO REQUEST TIMELY
HEARING

Before any penalty may be assessed under 33 U.S.C. 1321(b)(6), the person charged must be given notice and opportunity for a hearing on such charge. In the instant case, [the company] was notified of the charge against it by a letter dated 15 August 1978. The letter informed [the company] that it could respond to the charge by requesting a hearing, or by submitting a written statement in defense and/or mitigation. Your firm requested, and was granted, one extension of the time for responding to this letter. You responded to this notice on behalf of [the company] by a letter dated 18 October 1978. Your letter presented several considerations in support of your opinion that no penalty, or only a minimum penalty, ought to be assessed in this case. The letter ended with a request that if a penalty exceeding "a few hundred dollars" was to be assessed, you be afforded the opportunity to present further information at an informal hearing. The Hearing Officer assessed a \$3000 civil penalty on 7 November 1978, without providing an additional opportunity for a hearing.

The opportunity for a hearing was provided in the notice letter sent to the company on 15 August 1978. That letter clearly set out, as an alternative to a hearing, the company's right to respond to the Coast Guard's allegation by means of a written statement. By responding to the merits of the Coast Guard's allegation in your letter of 8 October, you opted for the latter alternative. Also, the request for a hearing set forth in your 8 October letter was conditioned upon the amount of penalty intended to be assessed. I do not believe that the Hearing Officer was required to extend the length of time to be consumed by these civil penalty proceedings to await your further decision as to whether the amount of penalty would justify your personal appearance at a

hearing. The opportunity for a hearing and a clearly defined time for making your choices were afforded. Your failure to properly respond can only be viewed as dilatory and as having waived the offered in-person hearing.

You also assert that you were not provided with an adequate opportunity to be heard at a "formal" hearing before an "independent" hearing officer in accordance with the procedures in 33 CFR 1.07. The interim final rule referred to in your appeal was published at 43 F.R. 54186 (20 November 1978), with an effective date of 20 February 1979. The hearing procedures set forth in that rule provide for hearings "conducted in an informal atmosphere with the maximum degree of flexibility consistent with the need to have an overlay framework and a record of what was done during the administrative process." 43 F.R. 54186. There is no indication in the record of the instant case that, had you availed yourself of the opportunity for a hearing which was offered, the hearing would not have been held in accordance with these regulations. In summary, I find that [the company] was given the "notice and opportunity for a hearing" required by 33 U.S.C. 1321(b)(6). In my opinion, the fact that a hearing was not held, given the circumstances of this case, is solely attributable to your failure to properly and timely request a hearing.

G-LMI ltr 16460 of 7 November 1979

FWPCA CIVIL PENALTY - SUBSTANTIAL PENALTY IN LIEU OF NOMINAL
PENALTY

[Y]our appeal contends that the gravity of the discharge, most specifically relating to want of culpability, warrants the assessment of a nominal civil penalty. Your appeal cites United States v. General Motors, 403 F. Supp. 1151 (D.Ct. 1975) in support of the contention. Preliminarily, I note that your reliance on General Motors, is not appropriate because of the factual dissimilarities in the cases. Further, section 311(b)(6) of the FWPCA is strict liability statute that contemplates a meaningful penalty even in the absence of fault. The Act is based on an enterprise liability concept, designed to shift the cost of oil pollution to the private sector. The statutory scheme is remedial as well as deterrent in nature, in that the civil penalties which are assessed are used to finance the elimination and prevention of oil pollution. As the Court of Appeals for the Seventh Circuit recently held in U.S. v. Marathon Pipe Line Co., 589 F.2d 1305 (7th cir. 1978), the imposition of a substantial penalty in the absence of fault is "rationally related to the FWPCA's economic purpose of placing the financial burden of achieving and maintaining clean water on the owners or operators of polluting

facilities [or vessels]." (at 1592).

G-LMI ltr 16460/8 of 28 November 1979.

**FWPCA CIVIL PENALTY - EFFECT UPON ABILITY TO CONTINUE IN
BUSINESS**

Your appeal contends that the assessed penalty "seriously impairs [your] ability to operate a profitable business." Preliminarily, I advise that the proper factor to be considered by the Hearing Officer is the effect of the assessed penalty on the owner's ability to continue in business. As such, the question of profits is not directly relevant except as the question to the ability to remain in business. By the notice of violation, dated 14 June 1978, you were informed of the opportunity to present, by written statement or at a hearing, any information bearing on the appropriateness of the preliminarily proposed civil penalty to the size of your business and to the effect it might have on your ability to continue in business. Such information was to be considered by the Hearing Officer before assessing a final civil penalty. Your response to the notice, dated 2 October 1978, contained no information regarding this issue, despite the Hearing Officers advice in the 14 June letter that information on this issue would be considered. Thus, you have waived further mitigation of the penalty on the basis of this factor and the penalty will not be reduced or mitigated on the bases of the assertion you are now making.

G-LMI ltr 16460/3 of 28 November 1979

FWPCA CIVIL PENALTY - "HARMFUL QUANTITY"

Your appeal contends that there is no evidence in the record indicating that the discharge was of a harmful nature, as the sheen test determination of harmful discharges is unreasonable. The Coast Guard is not authorized to determine whether a given discharge of oil into the waters of the United States is of sufficient quantity to be "harmful to the public health or welfare" within the meaning of 33 U.S.C. 1321(b)(3). Rather, it must follow the standards set forth in Title 40, Subpart 110.3 of the Code of Federal Regulations, which were promulgated by the Environmental Protection Agency under 33 U.S.C. 1321(b)(4). According to this regulation, an oil spill is deemed to be in a "harmful quantity," and prohibited by the Act, if it causes a film or sheen upon or discoloration of the surface of the water of adjoining shorelines; forms a sludge or emulsion beneath the water surface or on adjoining shorelines; or violates applicable water quality standards. A finding of actual harm

to the environment in each case is not required for purposes of the regulation and the Act. This is viewed as a reasonable and justified approach to the regulatory problem of preventing harmful discharges, particularly in light of the Act's language mandating an absolute prohibition on discharges of oil into or upon the nation's waters.

The validity of this regulation was upheld after extensive consideration by the United States Court of Appeals for the Ninth Circuit in the cases of United States v. Boyd, 491 F.2d 1163 (1973) and United States v. Kennecott Copper Corp., 523 F.2d 821 (1975). Although in arriving at its decisions the Court was primarily concerned with the regulations it bears on the question of whether a person in charge is required to report a spill, a fair reading of the cases also reflects approval of the regulation as a workable means for determining whether a given discharge is in itself harmful, without need for an individual determination that harm to the environment actually resulted from the spill.

[The Company] contends, citing United States v. Chevron Oil Co., 583 F.2d 1357 (5th Cir. 1978), that the discharge involved herein was of a de minimis quantity, and no penalty should have been assessed. Evidence in the record indicates that estimates of the quantity discharged range from 80 to 400 gallons. In this light, I cannot find that a de minimis quantity was involved. Further, notwithstanding the amounts involved, the Fifth Circuit in Chevron held that in de minimis cases, in order to overcome the presumption of a harmful quantity created by the sheen test, the defendant must present specific expert evidence that the discharge was not harmful. The Court stated, "Because the sheen test provides a generally valid and useful standard, it creates a rebuttable presumption that any spill which causes a sheen is harmful and therefore prohibited by 1321(b)(3). Evidence of a sheen thus provides sufficient basis for the Government to assess the 1321(b)(6) civil penalty unless a defendant proves that its spill was not harmful under the circumstances." Chevron, at 1363. Your appeal contains no evidence that the discharge was not harmful. Accordingly, as you have failed to overcome the presumption created by the sheen test I must reject this argument on appeal.

G-LMI ltr 16460/8 of 7 November 1979

FWPCA CIVIL PENALTY - IDENTIFICATION OF DISCHARGES

This case involved several possible sources for the involved discharge. The record of subject case reveals that a dual test oil sample analysis is the only evidence indicating appellant's vessel was the source of the discharge. Results

of the two tests conducted by a field laboratory are, standing alone, not sufficient to establish positive identification. However, where other evidence exists, analysis methods which are less rigorous than that of the Central Oil Identification Laboratory (COIL) may be useful to corroborate the other evidence regarding the suspected source. In a situation where an analysis is the only evidence which would identify a particular vessel as the source of a discharge, a COIL analysis is necessary to establish a firm identification. As subject case involved only a lesser method, and no other identifying evidence is contained in the record, I find that there is insufficient evidence to warrant upholding the penalty assessment.

G-LMI ltr 16460/5 of 7 November 1979 to CCGD5.

FEDERAL PREEMPTION UNDER THE FWPCA

On 22 August 1979 you asked questions concerning the preemption provision of section 312(f) of the Federal Water Pollution Control Act, as amended (FWPCA) (33 U.S.C. 1322(f)). My answers to your questions are based on the following assumptions: the State has applied for and received a section 312(f)(3) determination from EPA; the informal opinion dated 26 July 1979, of the Assistant Attorney General of Virginia represents the opinion of the State, and is, in fact, the way the State intends to enforce Regulation 5; the only matter addressed here with respect to Regulation 5 is its supposed requirement for a holding tank; and the questioned application of Regulation 5 is limited to these waters within the State of Virginia to which the FWPCA applies.

Your questions and my answers follow:

1. Is the State of Virginia preempted from enacting or enforcing Regulation 5 under section 312(f)(1) of the Clean Water Act?

It is the Coast Guard's position that section 312(f)(1) of the FWPCA prohibits states from adopting and enforcing requirements relating to the installation or use of marine sanitation devices on vessels subject to section 312. Thus, a state requirement that vessels with toilets must use a holding tank is preempted.

2. If the Environmental Protection Agency grants a "no discharge" certification under section 312(f)(3) for various waters within the State of Virginia, may a vessel moored and/or operating within these waters, be equipped with a Type I or Type II MSD if this vessel has the means to secure the through-hull fitting such that it will prevent the overboard

discharge of the effluent while operating within these waters?

As mentioned above, it is our view that a state may not regulate the use of marine sanitation devices on vessels subject to section 312. Thus, the answer to the question is "yes," so long as the device is secured to prevent the discharge of sewage.

3. If a vessel is equipped with a Type III MSD (holding tank), may that vessel install a "Y" valve with a through hull fitting which would enable the owner to discharge the effluent from the holding tank directly overboard while operating in approved waters, such as beyond the three mile limit in the Atlantic Ocean?

A "Y" valve is permitted so long as it is secured to prevent the discharge of treated or untreated sewage when the vessel is operating in the navigable waters of the United States.

G-LMI ltr 16460 of 3 December 1979

MANNING REQUIREMENTS FOR "GREAT LAKES" VESSELS

In connection with the question of manning requirements for vessels on the Great Lakes (vessels inspected and certificated for "Great Lakes" routes only), the applicability of statutes must first be made clear. It is evident from some of the discussion that has been presented that the Act of May 11, 1918 (46 U.S.C. 223), has been thought to apply in some fashion to these vessels (e.g., in talking of "two mate" ships). This Act applies only to "ocean" and "coastwise" vessels. "Coastwise" has here the meaning given the term at 46 CFR 70.10-13, and similar places and not the meaning of "coastwise" as in the term "coastwise trade" or in the context of seamen's shipping agreements.

The "two mate" concept may be borrowed from the "ocean and coastwise" system if it is found useful in making allowances for Great Lakes vessels, but as it does no more than set minima for licensed deck officers where it does apply, it cannot be construed in any fashion to set maximum requirements for Great Lakes vessels.

R.S. 4463 (46 U.S.C. 222) is the one controlling statute on the manning of inspected vessels on the Great Lakes and it is only under its authority that the customary "master" and three "pilots" are required. The determinations are, of course, subject to the three watch law (46 U.C.S. 673).

Much of the problem of manning for Great Lakes vessels appears

to involve the concept of "voyage". While an explanatory statement on the meaning of the "600 mile" clause of 46 U.S.C. 673, appearing in 46 CFR 157.20-5(b), notes that the term covers the period from initial departure from a port to "the final port of destination," the principal purpose of this reference is to prevent the use of "short" crews on the pretext that an "intermediate port" constitutes one end of a "voyage" of less than 600 miles. It is not necessarily binding as a general, all-purpose, final definition of "voyage." An important factor possibly overlooked is the relationship between "voyage" in R.S. 4463 and the term for which seamen are shipped.

It is the current practice in regulating the reports of seamen shipped otherwise than before a shipping commissioner (under R.S. 4551) to permit Great Lakes vessels to file one complete report at the commencement of a "season" with periodic "updates." That this method of reporting the employment of seamen is permitted should not be allowed to obscure the fact that on voyages between ports in non-adjointing States (a description that would apply, it is believed, to most "voyages" of "Great Lakes" vessels) the master must sign an agreement in writing with his crew. The agreement must state in precise terms "the voyage or the term of time for which... [the seamen] shall be shipped."

If a seamen's agreement on the Great Lakes is for a specified "voyage," with named ports for commencement and termination there is little problem in fixing whether a master had the required crew at any given point. The more difficult case would be when the "term of time" is specified, without relationship to ports. Assuming, for example, an agreement, to serve from a set date to a set date or one that events will render certain, it is justifiable to conclude that the loss of seamen during that period puts the vessel in the position of one which is about to "proceed on her voyage" within the meaning of R.S. 4463. Indeed, the attempt to escape from a requirement for personnel on the certificate of inspection on a thought that the vessel, not being on a voyage is not about to "proceed on such voyage" brings the protester squarely against R.S. 4520 (46 U.S.C. 574) again. If the vessel is not about to proceed on "such voyage" it is plainly commencing a new voyage and a new written agreement must be signed before the vessel may depart.

To focus on a factor that appears from discussions in this area to be troublesome, the question of "vacation" time may be noted. The deprivation of a seaman required by a certificate of inspection, in conditions under which a master may exercise judgment as to sailing shorthanded, must be without the consent of "the master, owner, or any other person interested in the vessel." If a preexisting labor-management contract is

responsible for the "loss" of such a seaman, it is clearly a deprivation with the consent of the owner even if it be argued that the master had no privity to the contract (an argument not persuasive in itself.) On this score, then, the fear that Great Lakes vessels may with impunity ignore certificates of inspection is groundless.

G-LMI memo 16712 of 29 November 79 to Merchant Marine Safety

NON-FEDERAL SOURCE FUNDING OF MEMBER'S EXPENSES FOR
PARTICIPATION IN NON-FEDERALLY SPONSORED ACTIVITY

The question is whether a member may accept from a non-Federal source reimbursement for expenses for or provision in kind or transportation, lodging, meals, and other services and accommodations so that the member may participate in a non-Federally sponsored activity. The member would attend the activity under permissive orders.

To answer this question, the nature of the activity, the non-Federal participants in the activity, and the activity's relationship to the member's duties as a Coast Guard employee are essential facts. They are essential facts because the main issue upon which the answer to the question turns is whether there is an actual or apparent conflict of interest. Among the activities for which permissive orders may be issued under Article 7-A-10 of the PERSMAN are many that may present an actual or apparent conflict of interest situation. Other essential facts are that permissive orders do not entitle the member to reimbursement of expenses by the Coast Guard, that travel on permissive orders is voluntary, but that the member continues to receive pay. (See Article 4-D-1(f)(5) of the PERSMAN.)

All the essential facts discussed in the preceding paragraph must be considered in applying the pertinent laws. The pertinent laws are 18 U.S.C. 209, 5 U.S.C. 4111, 49 CFR Part 99, and E.O. 11222.

Section 209 of title 18 U.S.C. is a criminal statute under chapter 11, "Bribery, Graft, and Conflicts of Interest," of that title. It basically prohibits any officer or employee of the United States from receiving, in connection with his government duties, any salary or any contribution to or supplementation of salary from a non-Government source. To constitute a violation, the receipt must have a connection with the services that the individual performs for the Government. (39 Op. Atty. Gen. 501, 503 (1940); 50 Op. Atty. Gen. 187, 190 (1942)). Section 209 has been interpreted to include reimbursement of expenses for attendance at non-Government events. (33 Op. Atty. Gen. 273 (1922); see also: 55 Comp. Gen. 1293, 1294 (1976); 46 Comp. Gen. 687, 690

(1967); 36 Comp. Gen. 268, 270 (1956)). The extent to which § 209 applies to payment in kind is less certain. There is some authority to the effect that payment in kind does not violate § 209 if the officer or employee is on leave without pay. (32 Op. Atty. Gen. 309 (1920)); however, since a Coast Guard member under permissive orders would be on authorized absence without pay, a violation could be deemed to occur under those circumstances.

There is a statutory exception to § 209. Section 4111, title 5 U.S.C., allows attendance with reimbursement, in cash or in kind, to the officer or employee if the payment is from a tax-exempt organization under 26 U.S.C. 501 (for IRS purposes) and the payment is "incident to training in non-Government facilities" or "incident to attendance at meetings." The official's or employee's per diem and transportation payments, if any, by the Government must be setoff accordingly. (Since no Government payment of this kind is made under permissive orders, such a setoff is not here an issue.)

Even if a situation were not covered by 18 U.S.C. 209 or were covered by § 209, but also subject to exemption under 5 U.S.C. 4111, it may still lead to a violation of E.O. 11222, Prescribing Standards of Ethical Conduct for Government Officers and Employees, and 49 CFR Part 99, the Department of Transportation's employee responsibilities and conduct regulations. Possible violation of the prohibition against employee activities that create an actual or apparent conflict of interest could occur under 49 CFR 99.735-9, Gifts, entertainment, favors, employment and reimbursement of expenses, or 49 CFR 99.735-11, Outside employment and other activities.

Under the laws discussed in the preceding paragraphs, there are several possible legal implications of a member on permissive orders accepting reimbursement, in cash or in kind, from a non-Federal source for attendance at a non-Federally sponsored activity. If acceptance would be covered under 18 U.S.C. 209, but not exempted under 5 U.S.C. 4111, acceptance should not be made. If acceptance would be covered under § 209, but exempted under 5 U.S.C. 4111, acceptance may be made unless there would be an actual or apparent conflict of interest that would violate E.O. 11222 and 49 CFR Part 99. If acceptance would not be covered under § 209, acceptance may be made unless there would be an actual or apparent conflict of interest that would violate E.O. 11222 and 49 CFR Part 99.

In light of the foregoing, the answer to the question is that there is no general solution. Therefore, a legal opinion of

the applicability of the laws discussed in this memorandum should be requested on a case-by-case basis. (Please note also that under Article 4-D-1(f)(6) of the PERSMAN, there are additional requirements for foreign travel which include DOD and State Department involvement.)

Each request for an opinion should include at least the following:

1. What the activity is.
2. Who is sponsoring the activity.
3. Who would be reimbursing you and for what.
4. Whether you would be receiving any type of award or honorarium.
5. What your participation would be.
6. Where the activity would take place.

G-LGL memo 7010 of 2 January 1980

INCENTIVE AWARDS FOR ENERGY CONSERVATION

The Chief Counsel reviewed an incentive awards program pursuant to which \$25.00 savings bonds would be awarded to those personnel living in Coast Guard housing who achieve the highest level of energy use reduction in any quarter. The money to purchase these savings bonds is to come from the appropriated funds which are saved as a result of the conservation of energy. The question is whether appropriated funds are legally available to purchase these bonds.

[In] an opinion by the District Comptroller that it would not be acceptable to use appropriated funds the Comptroller considered the Coast Guard awards statute, 14 U.S.C. 503, as a legal basis for the savings bond award program. However, he did not find that the proposal to create an award for personal energy conservation "can be considered to relate to Coast Guard missions directly enough to support the use of appropriated funds" to purchase and award savings bonds under the authority of 14 U.S.C. 503.

I agree with the Comptroller. The provisions of 14 U.S.C. 503 cannot be used to authorize an energy conservation award program of the type proposed. This section originally provided for awards for "boatmanship, gunnery, target practice, and engineering competitions." It was amended in

1949 to allow awards for "excellence in accomplishments related to Coast Guard service." See 81st Congress, House Report No. 557. The legislative history concerning the change to 14 U.S.C. 503 reveals that awards may only be made for excellence in accomplishments which have a direct relationship to a member's performance of duty as a Coast Guardsman. The conservation of energy by a person assigned to Coast Guard housing does not appear to be a type of duty for which an award may be given under the authority of 14 U.S.C. 503.

The proposal is closely analogous to a comparable question dealt with by the Comptroller General. A proposal to award savings bonds to personnel who did not use their sick leave was disapproved by the Comptroller General in his letter B156022, dated 11 February 1965. He reasoned that employees had a moral obligation to refrain from unnecessarily using sick leave, therefore, the award would recognize people for doing that which they were already required to do. Coast Guard personnel living in government housing likewise should only consume needed energy, and although the use of less energy than is reasonably necessary under the circumstances is a sacrifice worthy of recognition, it is not an accomplishment directly relating to the Coast Guard member's duties.

You have suggested that funds which were appropriated to implement section 547 of Pub. L. 95-619 might be available for use in the District's proposal. I disagree. Section 547 mandates that each agency conduct an energy audit in order to determine where, if anywhere, it will be necessary to improve the energy efficiency of the buildings under its control. It is reading far too much into that particular section to find that it authorizes the purchase of savings bonds for an energy conservation award program. There is nothing in the act which authorizes an expenditure of appropriated funds for the purpose of purchasing and awarding savings bonds to individuals who refrain from using excess energy. Purchasing the bonds would not be a necessary and proper utilization of these appropriated funds.

G-LGL memo 11101 of 26 November 1979.

RELINQUISHMENT OF EXCLUSIVE LEGISLATIVE JURISDICTION IN VARIOUS NEW YORK STATE LOCATIONS

A request was received to review proposed letters which seek relinquishment of exclusive legislative jurisdiction in various New York State locations and advise whether the relinquishment at these sites may lead to the possibility of a tax liability occurring against Coast Guard members on an

individual or collective basis.

There are presently a number of Federal statutes which provide for taxation of members living on Federal enclaves regardless of the type of legislative jurisdiction. Among these are:

Title 4 United States Code section 104, which provides:

All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicles may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. . . .

Title 4 United States Code section 105 which provides:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. . . .

However, this section does not authorize state taxation of sales by Federal instrumentalities.

Title 4 United States Code section 106 which provides:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such State to the same extent and with the same effect as though such area was not a Federal area. . . .

There is some protection to prevent double taxation afforded military personnel by the Soldier's and Sailor's Civil Relief Act, 50 United States Code Appendix, § 510, et seq. For purposes of taxation, the personal property, income, or gross income of a military person who is in a State, Territory, possession, or political subdivision, solely by reason of compliance with military or naval orders, and the service member is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within such State, Territory, possession or political subdivision and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision. This Act does not apply to personal property used in or arising from a trade or business if the State otherwise has jurisdiction for taxation. It should also be noted that the Act does not apply to the nonservicemember spouse.

G-LGL memo 11011 of 10 December 1979.

LEASE OF PARKING SPACES FOR PRIVATE VEHICLES

55 Comp. Gen. 1197 can be used as a basis to authorize the Coast Guard to expend appropriated funds for the leasing of parking spaces for our personnel if a showing could be made that a significant impairment to Coast Guard operational efficiency could thereby be avoided. After a review of the matter, we feel that 55 Comp. Gen. 1197, by itself, does not compel the conclusion that the Coast Guard has authority to independently acquire parking spaces for its members and employees through lease or otherwise. However, the issue discussed in 55 Comp. Gen. 1197 has caused us to take into consideration matters beyond the scope of the basic question presented by you. Our comments follow.

At page 1200 of 55 Comp. Gen. 1197, the Comp. Gen. essentially notes the general rule concerning a federal agency's authority to lease parking space for its employees, to wit., that an agency cannot expend appropriated funds for employee parking in absence of a statute authorizing this expenditure, citing 43 Comp. Gen. 131. This was a decision involving a Coast Guard attempt to establish an independent basis or authority for the lease of property for employee parking. Other decisions of the Comptroller General are noted as providing that agencies not having this specific statutory authority may request GSA to lease employee parking accommodations under the authority of the Federal Property and Administrative Services Act (40 U.S.C. §§ 471 and 490) where the requesting agency certifies to GSA that the parking

is required to avoid a significant impairment of the agency's operational efficiency. Should GSA agree, the requesting agency may then use appropriated funds to reimburse GSA for the cost of the leased parking accommodations. As previously noted, the foregoing represents the general rule. Nonetheless, 55 Comp. Gen. 1197 found that the general rule did not apply to the FAA since that agency had, in essence, a certain independent statutory authority which had been properly construed as permitting it to lease parking spaces without reference to GSA if the FAA determined, to its own satisfaction, that parking accommodations are needed in order to avoid the previously mentioned "significant impairment." Of note is that aspect of the FAA's statute which contained words of limitation, i.e. a specific exception to FAA's authority making GSA the sole provider of space in buildings for FAA use. The GSA had subsequently delegated this authority to the FAA, however, while the decision has no strict applicability to the Coast Guard, it has raised other questions in our minds concerning the Coast Guard's separate authority to lease or otherwise acquire interests in land for various purposes. As noted above, a previous attempt by the Coast Guard to gain approval for the independent acquisition by lease of interests in certain property adjacent to a Coast Guard installation in a metropolitan area was rejected at 43 Comp. Gen. 131. However, a review of this opinion has revealed that the Coast Guard attempted to support its effort to obtain the leased space under the authority found at 14 U.S.C. 93(j). This subsection authorizes the service to equip, operate, maintain, supply, and repair "Coast Guard districts and shore establishments." The Comptroller General did not view this authority as sufficiently broad enough to permit the acquisition of interests in land for employee parking by the Coast Guard.

Upon further investigation it appears that the Coast Guard may have other, and perhaps more persuasive, authority which was not brought to the attention of the GAO in our efforts to procure additional parking. 14 U.S.C. 92(f) empowers the Secretary to "acquire land or interests in land...when required for the purpose of carrying out any project or purpose for which an appropriation has been made...." You are cautioned, however, that under similar rationale set forth in 43 Comp. Gen. 131, the GAO could conceivably determine that the lease of parking space under this authority would not be reasonably related to any purpose or project for which an appropriation had been made, the inconvenience to employees alone not justifying the leasing of parking space. Another approach to this question involves GSA's special purpose space delegation to the Coast Guard found in 41 CFR 101-18.104 (1)(1). Essentially this delegation authorizes the Coast Guard to perform all functions with respect to acquisition of

space by lease including the acquisition by lease of "plots of land." This delegation is similar to the one given to the FAA which it construed as providing authority for lease of parking space in 55 Comp. Gen. 197 subsequent to that agency's determination that a "significant impairment to operational efficiency" would result if the parking spaces were not obtained. You are again cautioned, however, that the GAO's support of the FAA's position in the opinion may well have been predicated on the narrow fact situation in that case, i.e. the existence of a collective bargaining agreement containing certain management promises to provide parking to union members. Again, the GAO might well find any Coast Guard attempt to use this similar delegation as a basis to acquire parking as distinguishable on the facts from the FAA's situation.

Additionally, in the present governmental climate, the independent acquisition by an agency of parking areas for its employees would be subject to considerable administrative scrutiny. As an indication of this, paragraph 7 of OMB Circular A-118 (13 August 1979) conditions agency acquisition of parking spaces upon the structures contained generally in the Circular concerning the nature of agency use of parking areas as well as the fees to be charged for parking thereon. Similarly, the Circular further provides that agencies controlling their own parking facilities must abide by GSA regulations in FPMR 101-20.111 and 101-20.117 concerning allocation and use thereof. Furthermore, the Circular specifically provides in paragraph 9.c.(1) for GSA involvement in the establishment of parking fees at any agency-controlled parking installations. Hence, it is abundantly clear that it is the administration's aim to strictly control agency usage and assignment of parking space. Even if the authorities cited above were to be construed as providing the Coast Guard with independent ability to acquire property for parking we would be subject to strict controls from outside agencies (OMB and GSA) concerning the space so acquired. We therefore conclude that much doubt surrounds the question of independent Coast Guard authority to acquire property by lease for the purpose of personnel parking. If it exists at all, it would be a somewhat illusory power in terms of ultimate Coast Guard control over the use of the parking facilities thereby acquired.

G-LGL memo 7100 of 17 October 1979.

ADMINISTRATIVE COSTS UNDER OFFSHORE POLLUTION COMPENSATION
LIABILITY FUND

Are travel and civilian and military salaries directly

related to the administration of the subject fund chargeable to the fund under §§ 302(c)(3) of Public Law 95-372, Title III - Offshore Oil Spill Pollution Fund? Section 302(c)(3) provides as follows:

"The Fund shall be immediately available for - ... subject to such amounts as are provided in appropriation Acts, all administrative and personnel costs of the Federal Government incident to the administration of this title., including but not limited to, the claims, settlement activities and adjudicatory and judicial proceedings..." (emphasis added)

The plain meaning of the term "personnel costs" logically includes travel and salaries of Coast Guard personnel that are directly attributable to the administration of the Act. I have found nothing in case law or in the legislative history of the provision to indicate otherwise. There is also no other Coast Guard appropriation provision that would be more specifically available for that travel or those salaries. (Please note that the term "administration of this title" includes both "administrative" and "personnel" costs.)

Does OMB apportionment authority apply only to "administrative" (administration) costs and not to payment of claims under the Act?

OMB's apportionment authority is found in 31 U.S.C. 665(d)(2) (the Anti-Deficiency Act), as implemented by OMB Circular A-34. This authority extends to all appropriations or funds, with certain statutory exceptions. (43 Comp. Gen. 759, at 760 (1964)) The exceptions are found in 31 U.S.C. 665(f)(1) and include accounts for the payment of claims; however, application of these exceptions is at the discretion of OMB. OMB, therefore, may require apportionment of the subject fund even as it applies to payment of claims. (See also, § 41.1(c)(3) of OMB Circular A-34.)

G-LGL memo 7400 of 13 November 1979.

PERSONAL LIABILITY OF COLLECTION CLERK FOR LOSS OF FUNDS

An opinion on legal and equitable considerations raised by a request for reconsideration of the decisions to hold a collection clerk liable under 5 U.S.C. 5512 for a loss of funds from the office and to not forward a request for relief under 31 U.S.C. 82a-1 to GAO through the Department has been requested. The request argues that the clerk has not been

afforded procedural due process, that relief should be requested under 31 U.S.C. 82a-1, or that there should be an equitable elimination of her indebtedness.

PROCEDURAL DUE PROCESS

Citing Atwater v. Roudebush, 452 F. Supp. 622 (1976), the enclosure to reference (b) asserts that the clerk was not advised of his procedural rights, specifically his right (1) to present evidence on the specific issue of liability, (2) to be given access to information relied upon by the Coast Guard in making its decision, and (3) to administrative review. The enclosure to reference (b) thus asserts that he had not been given "a meaningful opportunity to present his case prior to any final administrative action" (a hearing).

Assuming that the clerk was entitled to rights of due process, he was given notice, during the investigation of the loss and before any decision as to his liability, that he had certain rights as a person subject to the inquiry or having a direct interest in the investigation. In a statement signed by him on 15 April 1976, he attested that, having been told that his rights were the same as those listed in §§ 0303 through 0306 of the Coast Guard Supplement to the Manual for Courts-Martial, he had read, understood, and had explained to him those rights and that he understood that any statement he made could be used against him. The rights that he read, understood, and had explained to him included the right:

- (1) to be represented by counsel;
- (2) to examine all the evidence before the investigative report was prepared;
- (3) to cross-examine witnesses;
- (4) to introduce evidence;
- (5) to testify as a witness upon being informed of his rights against self-incrimination;
- (6) to make a voluntary statement, oral or written, to be included in the record of proceedings or investigative report; and
- (7) to make an argument when all the evidence was presented.

The clerk obviously had been advised of and afforded the opportunity to exercise his procedural due process rights (including the rights to present evidence and to be given access to all the evidence) at a meaningful time (not only before a decision as to his liability, but before the investigative report was prepared). He was also thus given full opportunity to be heard at a meaningful time. (Please note that due process is a flexible concept that allows variances in the form of hearing opportunity (Morrissey v.

Brewer, 408 U.S. 471, at 481 (1972)) and does not require a formal evidentiary hearing (Atwater, at 631).)

In contrast, the circumstances in the Atwater decision cited by the enclosure to reference (b) were radically different from the clerk's situation. A decision had already been made when Mr. ATWATER was informed of his liability and its consequences. He had also not been advised before the decision of his right to review the evidence, to respond to it, or to present additional evidence and he had not been informed after the decision of his right to administrative review. (Atwater, at 628).

The clerk has been timely informed by the Coast Guard of his opportunity for administrative review of the initial decision and is now exercising that opportunity through the request for reconsideration. He has been timely informed and afforded this opportunity because the proper time is after the initial decision and before execution of the decision. (Atwater, at 631). That he has been so informed by the Coast Guard is obvious since a letter 5830 of 4 June 1979 concerning the collection clerk's negligence, was submitted on his behalf by the unit's C.O. (Please note, however, that it is inappropriate for the C.O. to act as an advocate for the clerk since he represented the Coast Guard in the original proceeding, signing the Action of the Convening Authority and Final Reviewing Authority. This does not, however, affect the fulfillment of the clerk's right to administrative review.)

In light of the foregoing, the clerk has been afforded his rights or procedural due process.

31 U.S.C. 82a-1 RELIEF.

The enclosure to reference (b) also requests reconsideration of the initial decision that the clerk's case should not be submitted to GAO with a request for relief from liability under 31 U.S.C. 82a-1. The enclosure to the C.O.'s letter contends that the clerk's negligence in failing to make deposits as required by regulations, although contributing to the size of the loss, was not sufficient to establish liability and was not the "proximate cause" of the loss.

Regardless of whether there is negligence or not, an accountable officer is automatically liable at the moment a physical loss occurs. (54 Comp. Gen. 112, at 114 (1974)). Relief from that liability, however, may be granted to the accountable officer under § 82a-1 if the officer was not negligent or guilty of bad faith or lack of due care. All that must be shown to deny this relief is simple negligence or bad faith or lack of due care and that the negligence or

bad faith or lack of due care was the proximate cause of the loss. (*id.*, at 114-115). A failure by the officer to follow regulations that causes the loss is considered negligence upon which relief is denied. (*id.*, at 116). Also, positive or affirmative evidence of negligence is not necessary. The mere fact that the loss occurred raises an inference or presumption that the accountable officer was negligent and that this negligence caused the loss. This inference or presumption is sufficient to deny relief unless there is other evidence to rebut it. (48 Comp. Gen. 566, at 567-568 (1969); see also, Serrano v. United States, No. 237-78 (Ct. Cl., decided Dec. 12, 1979)).

In the clerk's case, he failed to follow regulations by not depositing the money once the amount exceeded \$200, which was certainly a causal factor in the magnitude of the loss (\$1,440.60). Moreover, there was no evidence of forcible entry into the safe and no material evidence that another individual with knowledge of the combination took the money, which supports a reasonable, un rebutted inference that the clerk left the safe unlocked, which caused the loss of the money.

Applying the rules discussed above to these facts, the record appears to support a finding that his negligence is the proximate cause of the loss and thus supports a decision not to refer the case to GAO for relief under § 82a-1.

EQUITABLE CONSIDERATIONS.

The enclosure to reference (b) also asserts that an equitable elimination of the clerk's indebtedness would be in the best interests of the Government. To support this assertion, the enclosure to reference (b) states that he is a dedicated employee who has already been punished sufficiently by a letter of admonishment, a lowering of his performance rating, and not having been recommended for a quality step increase. No authority is vested in the Commandant for such an elimination. Elimination of his indebtedness administratively may only be done by GAO acting under 31 U.S.C. 82a-1. GAO does allow some administrative elimination of indebtedness of accountable officers by the Department through a delegation of authority in the GAO Standards (7 GAO 28.14). This authority, however, has been delegated by the Secretary to the Assistant Secretary for Administration. (See 49 CFR 1.59(c)(i).) The delegation is also limited by GAO to indebtedness in the total amount of \$500 or less. (See GAO amendment to § 28.14 dated 14 August 1974.) Furthermore, even if this authority were vested in the Commandant and the amount involved was \$500 or less, relief could only be based upon the same standard that applies to GAO relief under 31 U.S.C. 82a-1. (See 54 Comp. Gen. 112, at

113). Therefore, the equitable bases that the enclosure to reference (b) asserts would not be proper bases for elimination of the indebtedness.

CONCLUSION.

In light of the foregoing, it appears that the clerk's case should not be closed as requested by reference (b) and that the collection action against him should proceed.

G-LGL memo 5830

ENTERING INTO AND ACCEPTING ENLISTMENT EXTENSION CONTRACTS AFTER THE EXPIRATION OF AN ENLISTMENT TO CORRECT ADMINISTRATIVE ERRORS

The following is a response for a legal opinion on a remedial procedure to be used when the execution of a reservist's Reenlistment or Extension Contract is, "inadvertently delayed past the enlistment expiration due to extenuating circumstances, or reenlistment processing is not even initiated due to an administrative oversight," and a discharge is processed.

There is one basic issue in the situation described: when does the discharge in fact occur?

Regardless of the enlistment expiration date, service continues until discharge occurs. Discharge does not occur until competent orders directing the discharge are issued and the discharge certificate or other valid notice has been delivered to the person to be discharged. (U.S. v. Scott (No. 13, 937), 11 USCMA 646, 29 CMR 462; U.S. v. Brown (No. 15, 457), 12 USCMA 693, 31 CMR 279; U.S. v. Griffin (No. 15, 848), 13 USCMA 213, 32 CMR 213; see also U.S. v. Wheeler (No. 12, 868), 10 USCMA 646, 28 CMR 212 and U.S. v. Noble (No. 16, 079), 13 USCMA 413, 32 CMR 413) The date upon which the discharge certificate (or notice) is "delivered" is the key fact because that is the effective date of the discharge. If the delivery is by mail, there are two common ways a delivery date may be established: the date of mailing or the date of a postal return receipt; however, a date of mailing is only evidence of delivery and should be used only if there is no other evidence, such as a return receipt, by which to establish actual delivery date.

Thus, if the reservist properly executes a Reenlistment or Extension Contract within 24 hours of the date of a return receipt (or the date of mailing), no break in service occurs. Thus also, in reference to your remedial procedure, the effective date and the SUBSCRIBED date of the contract would

be the same. The reservist's records need only reflect the facts. (If a postal return receipt is used, the actual receipt should be attached to the records.)

Please note that the reenlistment becomes effective only on the date the contract is executed. If the contract execution occurs after the 24 hours succeeding the discharge delivery, the reenlistment may be back dated only through the BCMR.

I would suggest that, in addition to the systemic improvements that you are instituting to avoid the problem altogether, you take steps, such as notices to the individual member and the member's unit mailed well before the enlistment termination date that make these persons aware of the date and their reenlistment responsibilities. I also suggest that you require the use of postal return receipts and include with the discharge mailing a notice of the necessity of having a Reenlistment or Extension Contract executed within 24 hours of the date of receipt, if one has not already been executed. Such a method would increase the chances of successfully resolving those errors that nonetheless occur despite the systemic safeguards.

G-LGL memo of 20 November 1979.

LEGAL AUTHORITY FOR COAST GUARD RESERVISTS TO CONDUCT CRIMINAL AND BACKGROUND INVESTIGATIONS

Questions dealing with the exercise of law enforcement authority by reservists have been addressed by the Chief Counsel on several occasions. A distinction has been made between the authority of a reservist on active duty training and a reservist on inactive duty training. This distinction arises because of the interpretation of certain statutory language. The Chief Counsel has concluded that a reservist on active duty training has the same authority as a member of the regular Coast Guard while a reservist on inactive duty training has no law enforcement authority.

The one point not addressed therein was whether a reservist could be designated a "criminal investigator," as that term is used in paragraph 19a, Manual for Courts-Martial, for those periods of time that are spent on inactive duty training (weekend drills). If that could be lawfully done, it would appear that an exception could be made for military justice law enforcement not otherwise possible for general law enforcement. [It is] my opinion that the previous rationale (specifically, paragraph 6 of G-LGL memo 5820 of 21 Mar 1973) controls the hypothetical that I have posed. Accordingly, it is my view that the designation of a reservist as a "criminal investigator" solely for the purposes of acting as such for weekend drills would be contrary to the applicable statutes, as they have been

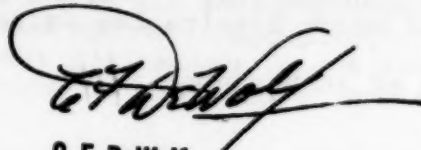
construed.

Because I do not view background investigations as part of a law enforcement function, I do not believe an IDT reservist is prohibited from conducting interviews and other tasks in gathering necessary information. On the other hand, a criminal investigation is part and parcel of law enforcement. Accordingly, an IDT reservist is without legal authority to conduct one.

An IDT reservist is without legal authority to conduct an investigation into the alleged violation of maritime laws.

An IDT reservist is without legal authority to make arrests or execute search warrants. Both acts are, necessarily, law enforcement functions.

G-LMJ/43 memo 5800 14 November 1979.



C. F. DeWolf
Rear Admiral, U. S. Coast Guard
Chief Counsel

SUPPLEMENT TO INDEX AND CITATOR

CODE OF FEDERAL REGULATIONS

<u>3 CFR 1.01-1</u> 24 LB 1	<u>33 CFR 1.01-20</u> 424 LB 1	<u>33 CFR 1.07</u> 424 LB 33
<u>3 CFR 1.07-20</u> 24 LB 32	<u>33 CFR 1.07-55(d)</u> 424 LB 32	<u>33 CFR 124</u> 424 LB 13
<u>3 CFR 124.14</u> 24 LB 21	<u>40 CFR 110.3</u> 424 LB 35	<u>44 CFR 126.27</u> 424 LB 21
<u>6 CFR 1.05(a)</u> 24 LB 1	<u>46 CFR 5.20-1(b)</u> 424 LB 29	<u>46 CFR 10.16-5(c)</u> 424 LB 25
<u>6 CFR 14</u> 24 LB 1	<u>46 CFR 15</u> 424 LB 1	<u>46 CFR 16</u> 424 LB 1
<u>6 CFR 26.25-1(c)</u> 24 LB 25	<u>46 CFR 69.05-1</u> 424 LB 22	<u>47 CFR 83.368</u> 424 LB 22
<u>9 CFR 99</u> 24 LB 40	<u>49 CFR 107(c)</u> 424 LB 21	

MANUAL FOR COURTS-MARTIAL

Manual for Courts-Martial, Paragraph 19(a)
424 LB 53

United States Code

<u>4 USC 104</u> <u>424 LB 43</u>	<u>4 USC 105</u> <u>424 LB 43</u>	<u>5 USC 4111</u> <u>424 LB 40</u>
<u>5 USC 5512</u> <u>424 LB 48</u>	<u>14 USC 503</u> <u>424 LB 42</u>	<u>14 USC 511</u> <u>424 LB 53</u>
<u>16 USC 1801 et seq</u> <u>424 LB 18</u>	<u>18 USC 209</u> <u>424 LB 40</u>	<u>31 USC (f) (1)</u> <u>424 LB 47</u>
<u>31 USC 82a-1</u> <u>424 LB 48</u>	<u>31 USC 665(d) (2)</u> <u>424 LB 47</u>	<u>33 USC 1208(b)</u> <u>424 LB 22</u>
<u>33 USC 1223(a) (5)</u> <u>424 LB 13</u>	<u>31 USC 1225</u> <u>424 LB 21</u>	<u>31 USC 1321(a) (7)</u> <u>424 LB 30</u>
<u>31 USC 1321(b) (1)</u> <u>424 LB 30</u>	<u>31 USC 1321(b) (3)</u> <u>424 LB 30</u> <u>424 LB 35</u>	<u>31 USC 1321(b) (6)</u> <u>424 LB 30</u> <u>424 LB 33</u> <u>424 LB 35</u>
<u>31 USC 1322(f)</u> <u>424 LB 37</u>	<u>37 USC 403</u> <u>424 LB 53</u>	<u>40 USC 471</u> <u>424 LB 45</u>
<u>40 USC 490</u> <u>424 LB 45</u>	<u>43 USC 1333(a) (3)</u> <u>424 LB 18</u>	<u>46 USC 1</u> <u>424 LB 1</u>
<u>46 USC 222</u> <u>424 LB 38</u>	<u>46 USC 224(a) (5)</u> <u>424 LB 25</u>	<u>46 USC 228</u> <u>424 LB 27</u>
<u>46 USC 267</u> <u>424 LB 16</u>	<u>46 USC 268</u> <u>424 LB 16</u>	<u>46 USC 391a(7) (N)</u> <u>424 LB 23</u>
<u>46 USC 391a(16)</u> <u>424 LB 13</u>	<u>46 USC 497</u> <u>424 LB 25</u>	<u>46 USC 498</u> <u>424 LB 25</u>
<u>46 USC 541</u> <u>424 LB 1</u>	<u>46 USC 543</u> <u>424 LB 1</u>	<u>46 USC 546</u> <u>424 LB 1</u>
<u>46 USC 563-66</u> <u>424 LB 1</u>	<u>46 USC 599</u> <u>424 LB 1</u>	<u>46 USC 621-28</u> <u>424 LB 1</u>
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U.S. GOVT. PUBS.
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LAW BULLETIN

NO.425

August 1980

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NAVIGABLE WATERS OF THE UNITED STATES; BOGUE FALAYA
RIVER, LOUISIANA, AT MILE 8.9

[The District Commander] forwarded for action [a] proposed determination that the Bogue Falaya River, Louisiana, at mile 8.9, is not part of the navigable waters of the United States. For the reasons stated below, the proposed determination [was] approved.

The Bogue Falaya River, at the location in question, is approximately fifty feet wide, is normally no more than twenty-four inches deep, and is not subject to tidal influence. Currently, because of its physical characteristics, the subject waterway is not used or susceptible for use by itself or in connection with other waters, as a highway for substantial interstate or foreign commerce. An 1884 report of the Army Corps of Engineers included the statement that, "it is evident that no improvement of Bogue Falaya above Covington can be made at any reasonable cost, and there is no need for such improvement." There has been no actual lumber/sawmill or other commercial usage of the waterway either at or above the point in question. There is some evidence of usage of the waterway for lumbering and sawmill operations approximately 600 feet below this point, but the magnitude of that enterprise is undetermined. It is my opinion, therefore, that there is insufficient evidence to conclude that the Bogue Falaya River, at mile 8.9, is part of the navigable waters of the United States.

This determination solely represents the opinion of the Coast Guard as to the extent of its own jurisdiction, and does not represent an opinion of the extent of the jurisdiction of the United States or any of its other agencies. This determination does not apply to the jurisdiction of the Coast Guard pursuant to the Federal Water Pollution Control Act.

G-LMI ltr 16211 of 20 February 1980 to CCGD8

MONITORING OF RADIO CIRCUITS FOR LAW ENFORCEMENT PURPOSES

It was stated that it is your intention to issue an amendment to the Coast Guard Communication Manual (CG-233) to implement the conclusion that monitoring of radio transmissions for law enforcement purposes is legally permissible. A proposed draft of the amendment was sent to this office for review. My comments follow.

There is a flat prohibition against the monitoring of radio transmissions in 47 U.S.C. 605. This statute provides that "no person not being authorized by the sender shall intercept any radio communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." While on its face the statute would seem to operate against U.S. Coast Guard law enforcement personnel, a further examination of the legislative history of this statute reveals that it was the intention of Congress that:

"Person does not include a law enforcement officer acting in the normal course of his duties."

See S. Rep. No. 1097, 90th Cong., 2nd Sess., 1968 U.S. Code, Cong. and Admin. News 2196. Section 605 of Title 47, U.S. Code does not, therefore, prohibit Coast Guard law enforcement personnel from intercepting radio transmissions and using them for law enforcement purposes.

Although you have not suggested a scenario in which Coast Guard personnel would monitor radio transmissions for law enforcement purposes, it is likely that such monitoring would take place in connection with the Coast Guard drug interdiction program. In a typical case, a Coast Guard radio operator might intercept radio communications between a "mother" ship and a "contact" boat establishing details of a marijuana drop. The case of United States v. Hall, 488 F.2d 193 (9th Cir. 1973), dealt with a similar fact pattern. In Hall, the defendant and his accomplice had installed radiotelephone equipment in the automobiles which they were using to carry out a marijuana smuggling business. Their transmissions were overheard by a housewife who informed the state police. At this point, the state police began covert surveillance of the defendant's radio transmissions. After a period of five weeks of surveillance, the defendants were arrested. This fact pattern is roughly analogous to and virtually non-distinguishable from the Coast Guard law enforcement scenario. The Court's holding in Hall is, therefore, applicable to the question at hand.

At trial the defendants challenged the monitoring of the radio transmissions as violative of 47 U.S.C. 605. Noting the language in the Senate Report, the Court held that 47 U.S.C. 605 was not applicable in this case and went on to say that "it is obvious that the legislature wanted law enforcement personnel to be governed exclusively by Chapter 119 of Title 18," United States Code. The Omnibus Crime Control and Safe Streets Act of 1968 is codified as 18 U.S.C., Chapter 119 and

deals with the interception of radio transmissions. As was said in Hall, "if the interception in question falls within the parameters of Chapter 119, the warrantless surveillance must be suppressed.

There are two types of communications the interception of which are illegal and therefore suppressible at trial. The first is "oral communication" defined at 18 U.S.C. 2510(2) as:

any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

Unlike 47 U.S.C. 605, Chapter 119 of Title 18 does not exclude federal law enforcement personnel from coverage. There is a prohibition in 18 U.S.C. 2511(1)(a) which provides that "any person who willfully intercepts...any oral or wire communication...shall be fined not more than \$10,000 or imprisoned not more than five years, or both." Furthermore, it is provided at 18 U.S.C. 2515 that "whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury...or other authority of the United States." Accordingly, an illegal interception of radio transmissions could result in personal liability for the Coast Guard law enforcement officer. At any rate, any illegally intercepted radio transmissions would be useless as evidence.

Returning to the scenario where a Coast Guard law enforcement official intercepts a radiotelephone transmission between two drug smugglers, a key question is the type of radio transmission intercepted. The Court in Hall defined a conversation between the parties using solely radio transceivers as "oral communication." There it was said that, "it is obvious that conversations initiated from a radiotelephone logically fall within the category of 'oral communication'." Such an oral communication would fall within the parameters of Chapter 119's proscription of illegal interception only if the conversants had a reasonable expectation of not being overheard. A standard for determining when that expectation is justified was announced in Katz v. United States, 389 U.S. 347 (1967) where it was said:

There must, first of all, have been a reliance on, an actual and reasonable expectation of, privacy.... The individual's subjective self centered expectation of privacy is not enough.

Thus, an objective standard is used to determine if the defendant's expectation of privacy is reasonable. It is relatively clear to see that, when a conversation is broadcast over public airwaves, any expectation of privacy would be unreasonable. A conversation which is conducted solely through the use of transceivers, e.g., ship to ship, would be oral communication and any interception by Coast Guard law enforcement personnel would be legal.

A different result ensues, however, when the intercepted radio communication is part of a conversation between a seabased transceiver and a land based telephone call which is placed via the marine operator. Despite the fact that the conversation is not private in nature, Congress has defined this type of communications as "wire communication." The court in Hall conceded that it was "forced to conclude that, when part of a communication is carried to or from a land-line telephone, the entire conversation is a wire communication and a search warrant is required." Absent a search warrant, an interception of a radio transmission between two parties, part of which is placed through the marine operator over land lines, is illegal.

The ultimate holding in United States v. Hall, was a reversal of the conviction. Despite the holding that the interception of oral communications conducted over radio-telephone was legal, the court found transceiver to telephone communications (even though a portion of that conversation was broadcast over public airwaves) to be a wire communication, the interception of which was illegal without a search warrant. In Hall, there were both types of interceptions, the one legal and the other illegal, and the state police were unable to distinguish what evidence was developed as result of which interception. Accordingly, the entire evidentiary package was thrown out. This is a problem which could confront the Coast Guard in attempting to monitor radio transmissions for law enforcement purposes. [What follows] is a suggested draft of the policy statement which would be suitable for inclusion in the Coast Guard Communications Manual (CG-233):

The interception of radio transmissions by Coast Guard law enforcement personnel is legally permissible only when such transmissions are placed entirely over the airwaves. The interception of any communication which is placed in whole or in part over a public correspondence (i.e. land line telephone) network is legally permissible only pursuant to a valid search warrant even though a portion of such transmission is broadcast over the airwaves. Illegally

intercepted radio transmissions are not admissible as evidence in a court of law or other type of proceeding.

G-LMI memo 2400 of 11 February 1980 to G-O

STATUS AS VESSEL OF THE UNITED STATES; EFFECT OF NEW HAMPSHIRE
REGISTRATION UPON

[You] requested my opinion as to whether the state of New Hampshire could require a vessel documented under the laws of the United States which is operated on Lake Winnepesaukee to possess a valid New Hampshire registration. Further, you ask whether or not the status of a vessel documented under the laws of the United States is affected if it is registered in accordance with the New Hampshire requirements. My comments follow.

[A previous opinion stated] that a vessel need not be operated upon the navigable waters of the United States in order to be documented under the laws of the United States. There it was said that "documentation entitlements depend on eligibility, not on where a vessel operates." Therefore, when a vessel meets the requirements for documentation contained in 46 CFR, Part 67, that vessel is entitled to be documented under the laws of the United States.

A documented vessel need not be numbered under the Federal Boat Safety Act of 1971 (FBSA). The FBSA (46 U.S.C. 1451 et seq.) provides at section 17 (46 USC 1466) that "an undocumented vessel equipped with propulsion machinery of any type shall have a number." Conversely, a documented vessel need not be numbered under the FBSA. In recognition of this, the Secretary has declared that the numbering provisions of the federal regulations do not apply to a "vessel which has or is required to have a valid marine document as a vessel of the United States." See 33 CFR 173.11(e). Therefore, a vessel which is documented under the laws of the United States may not be required to obtain a number under the Federal Boat Safety Act of 1971.

A different answer ensues when the FBSA does not apply. In the instant case, the documented vessel is kept on Lake Winnepesaukee in New Hampshire. Section 1453(d) of Title 46 U.S.C. provides that Lake Winnepesaukee is "declared not to be waters subject to the jurisdiction of the United States." Section 4 of the Federal Boat Safety Act of 1971 (46 U.S.C. 1453(a)) provides that the Act applies only on "waters subject to the jurisdiction of the United States and on the high seas

beyond the territorial seas for vessels owned in the United States." The FBSA does not apply in this case and therefore, any registration requirement of the state of New Hampshire for a vessel operated on Lake Winnepesaukee is not issued under the authority of the Federal Boat Safety Act of 1971. Since Lake Winnepesaukee is exclusively within the jurisdiction of the state of New Hampshire, the state, therefore, is within its rights to require a vessel kept on Lake Winnepesaukee to have a New Hampshire registration. A documented vessel kept on Lake Winnepesaukee must comply with federal requirements once it leaves the lake and enters water subject to the jurisdiction of the United States. At that time, the federal law would take precedence over the state law under the preemption doctrine and any New Hampshire requirements which conflict with federal requirements would have to yield. There is no problem with the state of New Hampshire requiring a vessel to hold a valid New Hampshire registration (since it is not issued under the authority of the FBSA) even if the vessel is documented under the laws of the United States. The vessel's status as vessel of the United States is not affected by its New Hampshire registration.

G-LMI memo 16713 of 11 February 1980 to G-M

OVERSEAS INSPECTION ACTIVITIES

You requested confirmation of the position that there is no legal prohibition against Coast Guard inspection, at overseas locations, of U.S. vessels and vessels which are going to be later documented as U.S. vessels. The short answer to your request is that there is no legal prohibition against overseas inspections.

One of my predecessors held that, "...there is no authority of law for sending Coast Guard inspectors to foreign ports for the purpose of making the statutory inspection of vessels." This opinion was based on an earlier opinion of the Attorney General that vessels overseas were not subject to the provisions of R.S. 4400 (46 U.S.C. 362) and that there was no statutory authority for sending inspectors out of the country. 21 Op.Atty.Gen. 52 (1894). During the 1950's, there was a gradual erosion of this position. As an example, it was held that Coast Guard inspectors who were in Germany on other business could incidentally inspect vessels which voluntarily applied for inspection. Finally, in 1961, the Chief Counsel stated that, "...Congress has itself revealed through its passage of amendments to R.S. 4417 (46 U.S.C. 391) an intention to remove any disability regarding travel of

inspectors to perform inspection functions." This opinion did not address the question of whether Title 52 provided authority to send inspectors overseas. However, it reasoned that since inspectors could go overseas to inspect for SOLAS 48 purposes, their additional activities for the purpose of inspection and issuance of Certificates of Inspection were permissible. [This opinion] also stated the opinion that the prohibitions of 46 U.S.C. 331 notwithstanding, there was adequate authority under 5 U.S.C. 140 for requiring reimbursement to the Treasury for inspectors' travel and subsistence expenses.

While the early 1960's was a period during which there were very few overseas inspections, a 1964 Chief Counsel's memo further opened the door by ruling that 14 U.S.C. 632 was broad enough to authorize sending inspectors overseas for the purpose of making an inspection of repairs following a casualty. The final barrier to conducting inspections fell in 1967 when Secretary Boyd directed reversal of our policy of only conducting overseas inspections in "extraordinary circumstances." Therefore, the emphasis was then shifted to implementing a program of inspections for new construction and major alterations. Efforts from that point to present have not been seriously concerned with legal barriers to inspection abroad but rather with the question of how to take resources from a hide which had "already been stripped." Although the Bureau of Budget and certain Congressional bodies were aware of our overseas activities, between 1961 and the present, there were no serious legal objections raised.

I have looked into this issue and its history again and see no legal reason for holding that overseas inspections are prohibited. On the contrary, I agree with the line of opinions, beginning in 1961, which found that there was sufficient statutory authority, independent of R.S. 4400, to allow such activity. While nearly twenty years of agency practice and congressional silence add legitimacy to the decision to inspect abroad, I note that intervening legislation supplies further support to our practices. Section 15 of the Tank Vessel Act, as amended by the Port and Tanker Safety Act of 1978, specifically provides for conducting overseas inspections of tank vessels. Thus, there is clear statutory basis for stationing or sending inspectors abroad for the purposes of that Act. In view of this, and the existence of other inspection laws, such as 46 U.S.C. 391, which are not restricted to tank vessels or U.S. waters, I believe that if there are any obstacles to your overseas program they are of a policy and resource nature rather than being legal in nature.

G-LMI memo 16711 of 5 February 1980 to G-M

CIVIL PENALTY - MINOR ALTERATIONS TO TANK VESSELS UNDER 46
U.S.C. 391A

The [Company] was charged with having failed to comply with the provisions of 46 CFR 30.01-10, which provides in pertinent part that, "when minor alterations or minor repairs of tank vessels become necessary such work shall be made under the direction of the Officer in Charge of Marine Inspection." The crux of the charge against your client is the performance of alterations which were not done under the direction of the OCMI. Thus, the classification of the alteration as major or minor is irrelevant. In point of fact, the alteration was considered minor by the Hearing Officer, but this does not have any bearing upon this violation.

When minor alterations to tank vessels are performed, 46 CFR 30.01-10 requires that "such work...shall be in accordance with the regulations in effect at the time the vessel was contracted for or built, or in accordance with the regulations in effect for new construction insofar as possible." You contend that the absence of reference to any such regulation renders the findings of the Hearing Officer erroneous. That contention also misses the point behind the charged violation. The violation which occurred was performing the work while not under the direction of the OCMI. It is irrelevant whether or not the work which was performed was in accordance with applicable regulations. The offense was complete once the work was undertaken without the direction of the OCMI.

Another basis of your appeal is that the work was in fact performed under the direction of the OCMI. In support of this contention you state in your appeal that a Coast Guard inspector, who was a representative of the OCMI, was on the tank vessel while the alteration was being performed. The Hearing Officer notes that the Coast Guard inspector does not remember discussing the alteration and that, further, it was his policy to require all alteration requests to be in writing. Regardless of that, however, your attempt to impute constructive knowledge of the alteration to the inspector is not material. The offense specifically requires more than awareness of an alteration by a Coast Guard employee: to wit, the alteration must be performed under the direction of the OCMI. You have submitted nothing to rebut the reports of 5 April or to show that the alteration was made under the direction of the OCMI. There is substantial evidence to support the finding of the Hearing Officer and the penalty amount is neither arbitrary nor capricious.

G-LMI ltr 16731/1 of 20 February 1980

CIVIL PENALTY - NEGLIGENT USE OF VESSEL UNDER 46 U.S.C.
1461(d)

On appeal, you contend that the other vessel was contributorily negligent in causing the collision, and, in any event [your vessel] was not being used in violation of 48 U.S.C. 1461(d). Your appeal is denied for the reasons stated below.

The record in this case establishes that the wheelhouse of [your vessel] was left unattended for a period of five to ten minutes before the collision. The "rig man," who was at the wheel prior to the collision, had gone below to make coffee. He had seen the other vessel before the collision, and noted that they were operating parallel to each other, about a quarter mile apart. The "rig man" then went below for "five to ten minutes" to make coffee. When he returned to the wheel he saw the other vessel "...directly in front of us, very close to us...."

I find that the record contains substantial evidence that [your vessel] was used "In a negligent manner so as to endanger...life, limb, or property...." [Your vessel's] wheelhouse should not have been left unattended.

The actions of the other vessel are irrelevant to the instant civil penalty action. This case deals only with the use of [your vessel] in the context of 46 U.S.C. 1461(d), and in no way concerns relative "fault" in the collision.

G-LMI ltr 16731/8 of 20 February 1980

CIVIL PENALTY - "SUPERVISION" OF OPEN TANK HATCHES

With respect to 46 CFR 35.30-10 the Hearing Officer's finding that a violation occurred is affirmed. This section requires that open tank hatches, when not equipped with flame screens, shall be under the "supervision" of senior members of the crew on a barge which is not gas free. The distinction here operates from the word "supervision" (as opposed to mere "observation" in section 35.05-15(b)(2)). The high risk of vapor ignition on a tank barge mandates that any tank opening which is not protected by a flame screen be supervised strictly by senior crewmembers. Because of the volatile nature of the commodities regulated by 46 CFR Subchapter D, even the most unexpected source of ignition could cause a disaster. 46 CFR 35.30-10, therefore, contemplates more than section 35.05-15(b)(2)'s "security" and "restricted access"

provisions. The term "supervision" used in section 35.30-10 can reasonably be interpreted only as requiring that senior crewmembers have immediate, direct control over any tank openings which are not protected by flame screens. In the instant case, the location of the crewmembers (some 150 feet from the barge and on a different vessel) precluded them from exercising the kind of control that the term "supervision" requires.

I find that the open hatches on the [vessel] were not under the supervision of the senior crewmembers on duty. The case record provides substantial evidence that the [vessel] was not gas free. It is undisputed that the barge's tank hatches were open without flame screens. Therefore, the Hearing Officer's finding with respect to the violation of 46 CFR 35.30-10 is affirmed.

G-LMI ltr 16731/8 of 20 February 1980

CIVIL PENALTY - "ADJACENT HOLDS" FOR STOWAGE OF INCOMPATIBLE CARGO

The facts in the case are undisputed and not at all complex. The #3 and #4 lower holds of the [vessel] are each divided into three spaces by two longitudinal bulkheads. Each space within each hold is accessible from the deck above by one or more vertical ladders (vertical access) and from the adjacent space within the same hold by access openings in the intervening longitudinal bulkheads (lateral access). The investigation revealed that, while the cargo stowed within each space was not incompatible, incompatibility existed in certain instances between the cargo stowed in adjacent spaces separated by the longitudinal bulkheads containing the lateral access openings.

In your appeal, you do not dispute the finding made by the Hearing Officer that the access openings in the cargo spaces in question were not effectively closed off, so as to preserve the integrity of the common longitudinal bulkheads. However, you contend that these cargo spaces are "adjacent holds" as defined by 46 CFR 146.29-11(c)(1), which satisfy the requirements of 46 CFR 146.29-99 that incompatible military explosives not be stowed in the same hold or compartment. You state that the lateral access openings were necessary, in order to comply with the inspection requirements of 49 CFR 176.39(a)(c). You argue that 46 CFR 145.29-11(c)(9), defining "cargo holds," is inapplicable because that section refers only to cargo spaces connected by vertical openings. You also argue that 46 CFR 146.29-11(c)(13), defining "compartment," is inapplicable because the cargo spaces in question are not

formed in part by the sides of the ship. Finally, you maintain that the openings did not alter the integrity of the common bulkhead and that the cargo was therefore not incompatibly stowed. Your appeal is denied for the reasons stated below.

Your argument that 46 CFR 146.29-11(c)(1), "adjacent hold," defines a type of cargo space which would satisfy the requirements of 46 CFR 146.29-99 is not well founded. Section 146.29-11(c)(1) is descriptive of the location of cargo holds rather than defining a unique type of cargo space. In any case, acceptable cargo spaces are divided in either section 146.29-11(c)(9), "cargo hold," or section 146.29-11(c)(13), "compartment." The basis of the violation in this case is the failure to store the cargoes in question in separate cargo spaces, whether holds or compartments. The evidence supports the finding that these spaces were not made separate from each other. If the integrity of the boundaries of a space is properly preserved, it may be used for the stowage of military explosive cargo, despite the presence of access openings to other spaces which may contain cargo which is incompatible with cargo stowed in the former space. On the other hand, if this integrity is breached, the spaces concerned cannot be considered to be separate holds or compartments and accordingly the incompatibility is violative of 46 CFR 146.29-99. In this case, the access openings were not completely secured, compromising the integrity of the boundaries of the spaces.

Your argument that the openings were not fully secured in order to provide access for inspections must be rejected. Inspections required by 46 CFR 146.02-12 (49 CFR 176.33(a)(c) is not applicable here) do not vitiate the requirements of permanently secured, so that inspections at sea cannot be made. The openings can expressly be fitted with doors, steel or wooden hatch covers, or bolted plates. Such fittings can be designed and constructed so as to enable removal at sea. The failure to utilize such fittings cannot serve as the basis for non-compliance with the stowage requirements of section 146.29-99.

G-LMI memo 16460/12 of 20 February 1980

CERTIFICATION AND LIABILITY OF PARTIES SUBJECT TO TITLE III OF
THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978

This memo is in response to [your request for] advice on Title III, 1978 OCSLA Amendments.

It is my opinion that work-over or fixed drilling rigs attached to fixed platforms, but having different ownership from the platforms, as described in reference (a), should be treated as separate facilities under Title III. Offshore facilities are defined in section 301 to include appurtenances related to any oil refinery, drilling structure, oil storage or transfer terminal, or pipeline, used to drill for, produce, store, handle, transfer, process, or transport OCS oil. The legislative history of the statute indicates that Congress intended to broadly define offshore facilities subject to the Title. The report of the Committee of Conference states that the statutory definition represents the "desires and intents" of both Houses of Congress. H.R. Rep. No. 95-1474, 95th Cong., 2d Sess. 126 (1978). The Senate version of the Title was intended to apply to "any offshore facility" in the Outer Continental Shelf. The definitions therein, including a definition of offshore facilities which mirrors that of the statute, were to be given their plain meaning. S. Rep. No. 95-284, 95th Cong., 1st Sess. 87, 88 (1977). The House version included the detailed, inclusive definition enacted into the statute, with the addition that any such facility even capable of being used for the functions enumerated in the definition, rather than actually so used, was included. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 179 (1977). Considering the broad intentions of Congress and the specific language of the statutory definition, it is clear that "portable" or "add-on" equipment, such as workover rigs or fixed drilling rigs, attached to fixed platforms, should be considered to be separate offshore facilities.

This classification as a separate facility is further dictated by the underlying purpose of the financial responsibility requirements of the statute. Section 305 requires that the owners or operators of all offshore facilities, as defined in section 301, except those not used to drill for, produce, or process oil or those which do not have the capacity to transport, store, transfer, or otherwise handle more than 1,000 barrels at any one time, be certified as financially responsible. The purpose of this section, of course, is to ensure that the parties engaged in offshore oil activities covered by the Title are financially able to pay claims assertable against them for oil pollution damages. If appurtenant equipment is under separate ownership from the platform to which it is attached, the owner or operator of the appurtenance must be certificated in order to accomplish that statutory purpose.

In your second question you ask whether a well, as distinct from the drilling or production platform (or, I would add, the pipeline) which may be associated with it, is an offshore

facility for the purposes of section 305(b) of the Act. Additionally, you request counsel as to the point at which financial responsibility must be established with respect to those wells. As a basis for the necessary analysis in responding to this question, the following description is assumed.

A well is made up of casing, extending downward from the surface of the seabed. During the course of drilling the well ("condition 1"), this casing from time to time extends above this surface until it is lowered into its final position as the drilling goes deeper. After drilling has been completed, if the search for oil has been unsuccessful, the well may be sealed as a "dry hole" ("condition 2"). However, if oil has been located, the well may be either capped to hold the discovered oil for later production ("condition 3"), or connected to a pipeline or production platform for transportation ashore either by the pipeline or vessel ("condition 4").

To begin, it is clear that, with the exception of "condition 2," a well as described above is a "facility" as defined in section 301(7) of the Act. Within the terms of that provision, a well is a "structure [see 33 CFR 135.201(b)(1) for a regulatory expression of recognition that a well is a structure]...used for the purpose of....drilling for ['condition 1'], producing ['condition 4'],...storing ['condition 3'],...or otherwise handling oil."

The next stage in the analysis requires a determination as to whether a well in any of the conditions described in paragraph 4 above is an "offshore facility" as defined in section 301(8) of the Act. In view of the remedial nature of the Act, especially title III thereof, a liberal interpretation must be given to its provisions to achieve its purposes. There can be no doubt that a well in conditions 1, 3, and 4 poses an oil discharge threat which might result in economic loss for which title III is intended to provide a remedy. Consequently, if a reasonable interpretation can be made to section 301(8) which would allow such a remedy respecting wells, it should be so made.

The relevant provisions of section 301(8) of the Act state:

"Offshore facility" includes any...drilling structure, oil storage or transfer terminal, or pipeline, or any appurtenance related to the foregoing, which is used to drill for, produce, store, [or]

handle...oil produced from the Outer Continental Shelf..., and is located on the Outer Continental Shelf,...;

Note should be taken of an important distinction between the manner in which this term and others are defined in section 301. With the exception of the term "United States" (section 301(12)), all terms other than "offshore facility" are defined using the restrictively specific word "means;" e.g., "Secretary" means the "Secretary of Transportation," section 301(1). On the other hand, "offshore facility" is defined using the word "includes" which is susceptible of being interpreted as indicating an illustrative list. Applying the liberal interpretation rule discussed in the foregoing paragraph, this distinction may be taken as an expression of Congressional intent to require such an interpretation rather than one which would find the list to be exclusive. Therefore, while a well may not fall strictly within the facility classifications specified in section 301(8), it may be assimilated thereto; i.e., drilling structure - "condition 1," oil storage terminal - "condition 3," transfer terminal or pipeline appurtenance - "condition 4." Furthermore, the uses specified in the definition would include the uses to which a well may be put; i.e., to drill for - "condition 1," to produce - "condition 4," to store - "condition 3." Finally, the wells with which we are concerned here are related to Outer Continental Shelf oil and are located on the Outer Continental Shelf. In view of the foregoing, it is my opinion that wells in conditions 1, 3, and 4 as described in paragraph 4a above are "offshore facilities" for the purposes of title III.

Finally, reference must be made to the provisions of subsection (b) of section 305 of the Act to determine which of the conditions described in paragraph 4 above will give rise to the financial responsibility requirements applicable to owners and operators of wells. This subsection, in relevant terms, establishes these requirements with respect to an offshore facility, including a well, "which (1) is used for drilling for, [or] producing,...oil, or (2) has the capacity to...store...or otherwise handle more than 1000 barrels of oil at any one time." Therefore, owners or operators of wells in conditions 1, 3 (where the oil held or "stored" is in a quantity greater than 1000 barrels), and 4 must establish and maintain evidence of financial responsibility in accordance with subpart C of 33 CFR part 135. More specifically, in answer to the second part of your question: (1) financial responsibility must be established to become effective at the point the first casing is put into place during the drilling operation; and (2) financial responsibility must be

maintained for the well until one of the following occurs, (a) the drilling operation is concluded without locating oil and the well is sealed as a dry hole, or (b) where oil is located, the well is sealed after it no longer can be found to hold or "store" 1000 barrels.

The extent of the liability of owners and operators of vessels and offshore facilities subject to Title III is generally described in section 304. Section 304(b)(1) enables owners and operators of vessels, if eligible, to limit their total liability, including liability for both removal costs and damages, to \$250,000 or \$300 per gross ton, whichever is greater. The owners and operators of offshore facilities may, if eligible, limit their liability to the total of removal and cleanup costs and \$35 million for damages, under section 304(b)(2). Section 304(d) obligates dischargers to pay all costs of removal incurred by Federal, State, or local governments, notwithstanding the limitations, exceptions, or defenses of section 304(b) or (c).

While section 304 describes the liabilities of owners and operators under the Title, section 303(b)(1) provides that the owners and operators of both OCS vessels and offshore facilities may assert claims for removal costs under certain conditions. Claims for the discharger's own removal costs may be asserted under 303(b)(1)(A) if the discharger has a defense to liability under section 304(c). If no such defense is available, but the conditions for limitation of liability under section 304(b) are met, section 303(b)(1)(B) authorizes a claim for removal costs incurred in excess of the available limitation.

There appears to be a conflict, in the case of offshore facilities, between the specific right granted by section 303(b)(1) to claim removal costs in excess of available limits to liability in the case of offshore facilities for removal and cleanup costs. This apparent conflict is resolved by the fact that section 304 establishes the liability of dischargers under the Title. A party, of course, cannot be liable, in the legal sense, to itself. Rather, liability is a responsibility or obligation to another party. Thus, while section 304(b)(2) speaks of the total of removal and cleanup costs, it does not include removal costs incurred by the discharger itself. This point is emphasized by the provisions of section 304(d) which imposes unlimited liability on dischargers for all governmental removal costs. It is further supported by the language of section 303(b)(1), which speaks to recovery of removal costs incurred by the claimant. Claims are therefore authorized only for the claimant's own removal costs. Since it can be seen that the liability provisions of Section 304

do not apply to self-incurred costs of removal, there is no inconsistency in concluding that removal costs incurred by the discharger may be recovered from the Fund or other liable parties, under the circumstances specified in section 303(b)(1). This claim authorization does not, of course, alter the discharger's liability to other parties, including the Fund, under section 304(b)(2) and (d). In order to be a claimant under section 303(b)(1)(B) the vessel or offshore facility discharger must first spend the required amount (the greater of \$250,000 or \$300 per gross ton and \$35 million, respectively), in removal costs. No setoff for any amounts paid to third parties for their damages or removal costs can be allowed under the statute.

Some ambiguity exists in applying the language of section 303(b)(1)(B) in the case where the owner or operator of an offshore facility has no defense to liability but is eligible for limitation of liability. Section 303(b)(1)(B) refers to "removal costs incurred in excess of 'that' limitation" available under 304(b), although no limitation of liability for removal costs is available in the case of offshore facilities, as noted previously. The limitation referred to must be read as an amount equal to the limitation that is available for damages, that is, \$35 million. This interpretation is necessitated by the introductory language of section 303(b)(1) which clearly states that offshore facility owners and operators may be claimants under its provisions. It would be illogical for Congress to have authorized recovery of removal costs where a defense exists but to prohibit recovery where the conditions for limitation are met. The applicability of subclause (B) should not be limited to vessels merely because of an ambiguity in its language. Furthermore, reference to the 304(b) limitation is not necessarily related only to a removal cost limitation not available to such offshore facility claimants. To avoid the removal cost claim as to offshore facilities would contravene the legislative purpose of obtaining the prompt removal of discharged oil. To deny the offshore facility discharger the right to claim its excess removal costs would have the opposite result of putting such a discharger in a position where it would be equally, if not more advantageous, to take no action but leave all cleanup and removal activities to governmental agencies. It is the discharger that is in the best position to begin immediate removal and cleanup activities. Section 303 and section 304, taken together, will operate to encourage such action by affording the offshore facility discharger the possibility of recovering its excess removal costs from the industry supported fund if prompt, voluntary, action is undertaken. At the same time, the amount of governmental removal costs, for which the discharger is liable under section 304(d), will be minimized.

Financial responsibility requirements of section 305 of the Title are not affected by the right of dischargers to claim removal costs under section 303(b)(1). Section 305(b) requires that owners and operators of offshore facilities establish and maintain evidence of financial responsibility to the amount of \$35 million in order to ensure that those owners and operators are financially able to pay claims asserted against them. Since they bear no liability under section 304 for their own claims, the financial responsibility of a party established and maintained under section 305 is not available for claims presented by the party. Consequently, financial responsibility coverage provided for the purposes of section 305, whether in the form of insurance, indemnity agreement, or other guarantee, cannot cover the owner's or operator's own removal costs. The amount to which evidence of financial responsibility is established must be held available for third party, including governmental, claims.

G-LMI memo 16613 of 30 January 1980 to G-W

APPLICABILITY OF 22 U.S.C. 2291(c)(1) TO COAST GUARD LAW ENFORCEMENT OPERATIONS

The subject legislation enacted on 30 June 1976 as Public Law 94-329 reads:

Notwithstanding any other provision of law, no officer or employee of the United States may engage in any direct police arrest action in any foreign country with respect to narcotics control efforts.

[You] sought advice regarding the applicability of 22 U.S.C. 2291(c)(1), the Mansfield Amendment, to propose joint operations between the Colombian Navy and U.S. Coast Guard to patrol Colombian waters for purpose of drug interdiction. In response to this request, [a previous memorandum opinioned] that the proposed operation ran counter to the mandate of the subject legislation and was therefore prohibited by the Act.

[You have sought] advice on another issue in relation to the applicability of the Act. The issue presented concerns the capability of the Coast Guard, in light of the subject legislation, to engage in drug interdiction efforts involving violation of United States law within foreign territorial waters and with consent of the foreign sovereign.

An overbroad reading of the statute would prohibit any arrest

action in foreign territory. The history of the Act and Conference Committee Report strongly suggests that the purpose of the statute was narrower. The report reads:

"Police actions involving U.S. personnel"

The Senate bill prohibited U.S. personnel from engaging in any police action in any foreign country in connection with narcotics control efforts.

The House amendment contained no comparable provision.

The committee of conference adopted a substitute provision which prohibits U.S. personnel from engaging or participating in direct police arrest actions in any foreign country in connection with narcotics control efforts. In adopting this provision the committee of conference seeks to insure that U.S. narcotics control efforts abroad are conducted in such a manner as to avoid involvement by U.S. personnel in foreign police operations where violence or the use of force could reasonably be anticipated. By "arrest actions" the committee of conference means any police action which, under normal circumstances, would involve the arrest of individuals whether or not arrests, in fact, are actually made. The committee of conference intends that the U.S. ambassador in any country where U.S. narcotics control activities are being carried out shall exercise close supervision over such activities to insure that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country." (emphasis added) Conference Report on International Security Assistant and Arms Export Control Act of 1976 H.R. Report #94-1013, 6 April 1976. See also Report of Committee on Foreign Regulations on S. 3439, U.S. Senate Report #94-876, 14 May 1976; and Committee on International Relations on H.R. 13680. House of Representatives Report #94-1144, 14 May 1976.

The statute prohibits "direct police arrest action" but does not define the meaning of the term. The legislative history does, however, shed light on the intent of this language. The committee reports refer to avoidance of foreign police operations which, due to the circumstances, could have adverse diplomatic impact. The direction for ambassadorial supervision is more explicit; "to insure that U.S. personnel do not become involved in sensitive, internal law enforcement

operations," (emphasis added). The intention of the Act is, therefore, to proscribe the application of federal forces to assist foreign governments in the enforcement of their local law. It is clearly not intended to prevent the U.S. from enforcing U.S. law when applicable within the territorial sea of a foreign nation.

The routing of narcotics traffic from South America to the Gulf States and eastern seaboard increases the incidents of vessels within the territorial sea of another country violating the laws of the United States. The Fifth Circuit Court of Appeals has found that the U.S. Coast Guard can validly assert its law enforcement jurisdiction over an American vessel in foreign waters, United States v. Conroy, 589 F.2d 1258 (1979). It would also appear appropriate for the U.S. to board a foreign vessel of a third nation in foreign waters under the terms of a special arrangement and for prosecuting the case where the evidence supports a violation of U.S. law. (The above statement presupposes proper entry into the territorial waters of the foreign nation.)

The legislative purpose underlying the Mansfield Amendment, the avoidance of actions which would have an adverse impact on foreign relations, is met by obtaining permission of the foreign state prior to entering its territorial seas for law enforcement purposes.

G-LMI memo 16210 of 16 January 1980 to G-O

COAST GUARD'S ROLE IN PROVIDING FIREFIGHTING ASSISTANCE

The present Coast Guard role of providing firefighting assistance to local authorities to the extent Coast Guard resources are available reflects several basic considerations. The most obvious of these is a lack of sufficient resources, including vessels, other specialized equipment, and personnel trained in firefighting, to respond adequately to the broad responsibility that a primary firefighting role represents. An increased firefighting role would therefore have to be accompanied by substantial additional resources to enable the Coast Guard to perform that mission successfully.

Beyond the resource and budgetary problems that would be presented, my review of our statutory grants of authority reveals that the Coast Guard has no statutory mandate to assume this traditionally state and local responsibility. No statute grants authority to the Coast Guard to take a primary role in providing a firefighting capability or to coordinate and control firefighting response efforts. Discretionary

authority is granted by Section 88 of Title 14, United States Code, to take any actions to protect persons and property at any time and place where our resources are available and can be effectively utilized. The Coast Guard may also utilize its personnel and facilities, where available, to assist state and local governments to perform any activities for which our personnel and facilities are especially qualified, under the authority of Section 141 of Title 14. These general, discretionary grants of authority are in keeping with the Coast Guard's multimission responsibilities, which demand that our resources be available for a variety of response situations. They also reflect the Congressional intent, as evidenced in the Federal Fire Prevention and Control Act of 1974 (P.L. 93-498), that firefighting continue to be a state and local function.

It is my conclusion, in light of these factors, that port area firefighting is, and should remain a local responsibility. The Coast Guard's role must, then, remain a secondary one, whereby assistance will be provided to local port authorities to the extent that regular resources are available, as stated above.

G-LMI ltr 16600 of 11 January 1980 to NTSB

MARINE SANITATION DEVICES - RESPONSIBILITIES OF BOAT DEALERS

[You have asked] whether dealers or brokers of used boats contravene section 312 of the FWPCA if they sell the boats with uncertified MSD's. Section 312 places no special responsibilities on sellers of used boats.

Unless the used boat dealer or broker is a "manufacturer" (as defined in Section 312(a)(7)) the only possible violation is for operating a vessel with a non-approved MSD. This would mean that the vessel would have to at least be in the water. Then it would have to be determined that the dealer or broker was "operating" the vessel.

G-LMI memo 16450 of 23 January 1980 to G-WEP

MARINE SANITATION DEVICE INSTALLATION REQUIREMENTS FOR "NEW" VESSELS

[You posited a] situation in which a manufacturer of a "new" vessel (for MSD purposes) installs the hull and deck fittings for direct discharge devices, but does not install the toilet. Instead, the manufacturer supplies the toilet as a separate

unit, and the purchaser completes the installation. You ask whether the manufacturer can be considered as selling a vessel with an "installed" head, thereby being subject to 33 CFR 159.5.

I think the situation is more properly within the prohibition of paragraph (h)(1) of 33 U.S.C. 1322. It is unlawful for the manufacturer of a vessel subject to the MSD standards and regulations to sell the vessel unless it is equipped with a MSD which is in all material respects substantially the same as the appropriate certified test device. A MSD includes equipment for installation on board a vessel which is designed to discharge sewage. A toilet which is to be fixed to the vessel and connected to through hull and deck fittings is a MSD, as it is equipment for installation. Therefore, the manufacturer of a vessel who sells the vessel with through hull fittings, and a toilet to be installed by the purchaser, is selling a vessel with a MSD. If the MSD is not an approved MSD, the manufacturer has violated paragraph (h)(1) and is subject to a \$5000 civil penalty.

In addition, the operator of the vessel would also be subject to civil penalties if the vessel is operated with a non-approved MSD. 33 U.S.C. 1322(h)(4) and (j).

G-LMI memo 16450 of 10 January 1980 to G-WEP

FWPCA CIVIL PENALTY - NON-COMMERCIAL POLLUTER LIABLE

It is your contention that the statute only applies to "flagrant industrial polluters who cause large scale harm to the environment." This position is incorrect and has been addressed several times by the courts. The language and Congressional intent of the Act demonstrate that in any case in which an amount of oil sufficient to create a film, sheen, or discoloration on the water surface is discharged, the Coast Guard must assess a civil penalty. The Congress and the U.S. Comptroller General have both indicated quite strongly to the Coast Guard that we do not have any discretion to refrain from assessing a penalty in the case of a proven violation. (See, for example, Comp. Gen. Opinion B-146333). Similarly, I must point out that the fact that the vessel which discharged oil was used for recreational rather than commercial purposes is not a defense to imposition of a penalty. However, it appears that this may have been one of the factors which influenced the Hearing Officer to assess a penalty substantially below the maximum.

I note that the procedures which were utilized in your case

offered a full measure of administrative due process, are in compliance with both the Federal Water Pollution Control Act and Coast Guard regulations, and were recently upheld by the U.S. District Court in New York. The penalty, therefore, will not be set aside and your request is denied.

CIVIL PENALTY - BARGES ADRIFT

On appeal, you admit that the barges were anchored with a single one-inch wire cable and that the barges did break away from the mooring. However, you dispute the finding of negligence maintaining that reasonable and prudent care is used in the company's mooring procedures. You argue that the single anchor cable was severed, apparently by the propeller of an unknown third party's vessel, rather than as a result of undue stress. You maintain that the company employs adequate safety inspection and surveillance methods. Finally, you seek rescission of the assessed penalty on the basis that the loss of this mooring is a large financial burden on the Company, which should serve as the penalty in this case. Your appeal is denied for the reasons stated below.

Substantial evidence exists in the record of this case to support the finding by the Hearing Officer of negligence on the part of the company. In the ordinary course of events, properly moored barges would not break away from their mooring. The fact that the barges did come adrift in this case is prima facie evidence that negligence existed. In such a case, the burden is on the party seeking to avoid liability under the statute to demonstrate that an adequate standard of care was maintained. The evidence presented in this case fails to demonstrate that an adequate standard of care was maintained. The mere statement that the moorings would have held if not for an intervening vessel's propeller is not sufficient to demonstrate an adequate standard of care.

The evidence indicates further that adequate surveillance was not maintained, despite contentions to the contrary. The breakaway was not discovered by the Company until it was notified by personnel of the Lake Ponchartrain Causeway, against which one of the barges came to rest and nearby which the other two barges were drifting. That area is approximately nine to ten miles from where the barges were originally moored. A sufficient period of time therefore passed during which the company could have prevented or at least discovered the breakaway, and taken prompt action to recover the barges, had adequate surveillance been maintained. While the actions to modify the company's mooring practices are welcomed and encouraged, this cannot serve as the basis

for mitigation of the penalty, as the deterrent effect of the assessed penalty would be vitiated thereby.

Your request that the assessed penalty be remitted in light of the financial burden resulting from the loss of the anchorage cannot be granted. That loss resulted directly from the company's own negligence. The imposition of a civil penalty for negligent use of a vessel is designed to encourage proper use and operation in the future. This effect would be deleteriously affected by a remission of the assessed penalty.

G-LMI ltr 16713/8 of 31 January 1980

CIVIL PENALTY - DISMISSED FOR LACK OF SUBSTANTIAL EVIDENCE

The record in the subject case is returned and the case is dismissed. I find the evidence in the record is insufficient to support the finding that there was a violation of 46 CFR 35.30-10. As pointed out in the District Legal Officer's comments concerning this case, the cited regulation prohibits opening of ullage holes without flame screens or without supervision of senior crewmembers on duty. The record here fails to provide evidence that the ullage holes were not supervised and, consequently, that flame screens were in fact required. Without this evidence there is no basis upon which a violation of this regulation may be found to have occurred.

G-LMI ltr 16616/8 of 31 January 1980 to CCDG8

CIVIL PENALTY - IMPROPER LOCATION FOR DANGEROUS CARGO MANIFEST

On appeal you contend, apparently, that the dangerous cargo manifest would have been readily available in an emergency and its location in a locked cabin one deck below the bridge was sufficiently "near the bridge" to comply with the regulation. Your appeal is denied for the reasons stated below.

Section 176.30(a) of Title 49, Code of Federal Regulations, requires that the dangerous cargo manifest be kept in a designated holder on or near the vessel's bridge. The purpose of this requirement is to ensure that the manifest be readily available and accessible during an emergency. The location of the manifest in a locked cabin one deck below the bridge, even if the cabin was that of the officer in charge, does not comply with either the intent or the purpose of the regulation. The manifest must be readily available, during an emergency, to personnel other than the officer in charge,

especially when that officer cannot be reached. The purpose of the regulation is not, as you intimate on appeal, merely to ensure that the manifest be available for routine inspection by safety boarding parties.

In view of the potentially serious consequences of this violation to the vessel, its crew, and the port area, as noted by the Hearing Officer, I cannot find that the assessed penalty is either unreasonable or inappropriate.

G-LMI ltr 16616/7 of 31 January 1980

CIVIL PENALTY - "BORROWED" BOAT

The record shows that the Hearing Officer was aware that the boat was borrowed. The fact that you only borrowed the boat, however, did not relieve you of the responsibility, as operator, to make sure that all applicable safety requirements were satisfied. Similarly, the facts that you were in the boat only thirty minutes, and that this is your first offense do not negate the serious safety violation which occurred. Under all the circumstances, I do not consider the Hearing Officer's decision to assess a penalty in this case to have been arbitrary or capricious.

G-LMI ltr 16460/5 of 2 January 1980

CIVIL PENALTY - UNTIMELY SUBMISSION OF EVIDENCE OF FINANCIAL STATUS

Your letter of 18 January 1980 and your Profit and Loss Statement for March 1979 have been received. Due to the untimely submission of this material it cannot be considered as part of the appeal which is presently pending. You were given the opportunity to submit evidence concerning the financial status of your business to the Hearing Officer in his letter dated 23 May 1979. In this connection, you were advised that an audited statement of the past six months of operation would be necessary. You have made reference to the fact that your company has been losing money. However, you failed to submit the necessary data to the Hearing Officer to support your contention and thereby waived further consideration of that issue on appeal. 33 CFR 1.07-70(a).

The Profit and Loss Statement is returned herewith. You will be advised of the decision on your appeal as soon as it is issued.

G-LMI ltr 16460/8 of 30 January 1980

FWPCA CIVIL PENALTY - DENIAL OF PROCEDURAL DUE PROCESS

The case has been dismissed on the basis of Appellant's argument that it was denied procedural due process during the hearing proceedings. This decision, however, is strictly limited by the particular circumstances under which the case has developed. In order to explain more fully the reason for the dismissal, a review of some particular facts is necessary.

The discharge in this case was discovered in September, 1973. Subsequent investigations led to a determination that the oil was leaching from the bank of the Pawcatuck River in the vicinity of a building owned by [X]. Apparently, oil had been spilled into the soil in this area sometime prior to 22 September 1973 and the earth had become saturated to the point where leaching occurred. A hearing was held and a civil penalty was assessed. [X's] appeal from the assessment was denied. The case was reopened prior to collection action, however, because of some possible procedural deficiencies which arose in light of the decision in United States v. Independent Bulk Transport, Inc., 394 F.Supp. 1319 (S.D.N.Y. 1975). The case was remanded for further proceedings, to insure that any information related to the penalty assessment would be provided to [X] for comment and review prior to the Hearing Officer's decision. The instant appeal is from the decision reached by the Hearing Officer after the second hearing.

The evidence relied upon in establishing liability consists essentially of oil sample analysis data. There were no observations of a direct flow of oil from the facility to the river. There was evidence that an adjacent facility had experienced a significant loss of heating oil from its tank prior to September 1973. Under these circumstances, it is quite understandable that the oil sample analysis would be looked to as the critical determinants in establishing the identity of the oil source.

Two oil sample analysis reports appear in the record. Both reports were made by the Coast Guard laboratory in Groton. The first report, dated 29 October 1973, concerns six oil samples taken at the investigation site. The report comes to three basic conclusions: (1) the oil in the river was a mixture of two types of oil; (2) the oil in the [X] tank was "related" to one of the two oils found in the river; and (3) the oil taken from a sump hole at the [X] facility "closely resembled" the oil found in the river. It is important to note at this point that the sump hole at [X's] facility was part of a system which occasionally circulated water from

the river (through a cistern) into the facility, supplying water to the facility's fire sprinkler system. The fact that the sump hole contained water taken from the river would explain the "close resemblance" between the oils at each location. This evidence ("close resemblance"), therefore, must be regarded as equivocal with regard to establishing that the oil originally was discharged from [X] facility. Lastly, the report stated that the oil in the [other facility's] tank was "uniquely different" from the oil in the river. Insofar as the record contains uncontradicted evidence that the [other] facility recently had changed the type of oil it used, the finding here of a "unique difference" had little probative effect in the context of the case.

The Hearing Officer found that the oil in the river had leaked from [X's] storage tank. The first oil sample analysis report stated that the oil in [X's] tank was "related to" one of the two oils in the river, and that the analytical results obtained "strongly indicated" that the oil from the tank was in the mixture of oils in the river. The second analysis report involved four oil samples: one from the salt water cistern; one from a site dug near the river; one from the [X] oil storage tank; and one from a pit dug near the tank. This second report, dated 14 August 1974, says that the earlier analytical conclusions were confirmed; i.e., the samples collected from the pits on the [X] property and the samples collected from the salt water cistern and fuel storage tank "contained the same oil." No other evidence with respect to the sample analyses (i.e., charts, graphs, technician's notes, etc.) appears in the record.

The differences between the two laboratory reports (which, given the vague terminology used in the earlier report, might appear as inconsistencies) are made important by Appellant's repeated requests for an opportunity to question the persons who prepared those reports. Ordinarily, there is no need for the cross examination of persons preparing oil sample analysis reports. This is so because the reports are usually well documented with machine-produced graphs and technician's notes, and because such scientific evidence usually is corroborated by other evidence gathered by the investigators. Because of the unusual circumstances presented in the instant case, with two possible sources, the oil sample analysis data becomes extremely important. The statement that Appellant was allowed to view "everything in file" rings somewhat hollow when the critical evidence in the file (the second laboratory report) is little more than a bare assertion of Appellant's liability. Under the circumstances, a duty was owed to Appellant either to produce

further documentation substantiating the laboratory report, or to provide Appellant with the opportunity to examine the person(s) who conducted the analysis and prepared the reports. The failure to take either of these alternatives, under the particular circumstances of this case, was sufficient to deny Appellant the full access to the Coast Guard's evidence which it deserved. Accordingly, applying the rule set forth in United States v. Independent Bulk Transport, Inc., 394 F.Supp. 1319, the decision and assessment in the instant case cannot be sustained.

G-LMI 16460/3 of 31 January 1980

MERCHANT MARINER'S DOCUMENTS (CERTIFICATES OF SERVICE);
"ENDORSEMENTS;" AMENDMENT OF 46 CFR 12;
"INDUSTRIAL WORKER"

[Review was sought] of a problem perceived in the issuance of "merchant mariner's documents" and the "endorsements" placed on them for various "ratings." It is suggested that a clue to a basic flaw in the approach to the "problem" is found in the language of the "Major Issues" [the work plan]. We are told that 46 CFR 12.02-7 requires something and that therefore 46 U.S.C. 12.25 should be amended. It is true that a regulation binds the rulemaker in our present system, but we should always look first to the statute, to see what it requires, then to the existing rules to see whether they possibly limit our use of the statute undesirably or pose no bar to doing what we want to do.

We must always be conscious of the fact that the very arrangement of Part 12 has been skewed by the creation of the multi-purpose "merchant mariner's document" and any directed inquiry toward any specific provision of the Part may be fraught with unforeseeable consequences. The "work plans" for the "industrial worker" endorsement reflect a basic misconception of the necessity and functions of the "certificate of service" required by 46 U.S.C. 672. Admittedly, basic flaws of the statutes have caused problems, but the initial difficulties have been compounded by some disregard of the statutes and by earlier amendments to regulations which were apparently drafted without due regard to the history and the context of the regulations themselves. It is possible that, prescinding from deficiencies in the present state of Part 12, title 46, CFR, a mountain is being made out of a molehill.

The idea appears to be that with the advent and increase of a new class of unquestioned "seamen" we must add to a "list" of authorized ratings for merchant mariner's documents (read:

"certificates of service") a new rating - "industrial worker." It is said: "...this proposed regulation updates subpart 12.25...by adding the INDUSTRIAL WORKER endorsement...." A cursory reading of the Subpart, especially section 12.25-10, reveals that although sections 12.25-25 through 12.25-40 may be either without statutory authority or superfluous there is in no sense a "list" that must be added to in order to bring about an "endorsement" as "industrial worker."

Subpart 12.25 does not, it will be noted, say in effect "Merchant Mariner's documents, other than those provided for above, may be issued only in the following ratings..., " thus precluding issuance of a certificate as an "industrial worker." It may well be that, the invalidity of -25 being admitted, the drafters of -35 and -40, in 1966 and 1975, misread the coverage and intent of the existing body.

12.25-10 says only that documents shall be issued without examination to applicants for ratings "other than" the "qualified" ratings. It then gives a single example and notes that a "holder" of one certain rating may serve in other unqualified ratings in the same "department." All in all, four "departments" are accounted for: deck, engine, steward, and staff. But note first that there is not even an attempt to identify those unqualified ratings in the deck and engine departments other than "ordinary seamen" and "wiper." Note also that not one "rating" in the steward's or staff department is identified in any manner, shape, or form. (Re: "department" [See below]).

Subsections (g) and (1) of 46 U.S.C. 672 impose no limits of any kind on the "ratings" which may be issued or even as to the "departments" in which they may be, in cases of "non-qualified" seamen. Note also that the only qualified rating actually specified in 672 is "able seaman." From the beginning of the "certificate of service" program, it was left to the Administrator to determine which were "qualified" ratings in the engine department and to set the professional standards therefore.

The regulations themselves, properly read, do not contain a self-imposed limit on what the Administrator may issue as an "endorsement" ("rating" or "capacity"). 12.25-10 gives examples; it is not definitive. In recognizing existing departments it does not bar the acknowledgment or even "creation" of other departments.

The later added sections may be noted briefly. 12.25-25, added in 1958, is probably illegal. The additions of

12.25-35 (1966) and 12.25-40 (1975) reflect a yielding to pressure of outside interests to permit or avoid some result not properly within the scope of our activity. The provision in each case that the holder of the "endorsement" may not serve in "any of the regular ratings" stems from a seed innocently but unwarily planted in 12.25-10, but points up the lack of due analysis of fact and regulation. One must ask, "What are regular ratings?"

A lot of history has been overlooked in the drafting of what is the current basic Part 12 of title 46. "Librarian," "musician," "concessionaire" are among the "ratings" that had been issued. The requirements were recognized that such people were "seamen" under R.S. 4612 (46 U.S.C. 713) and that a certificate of service was required under 46 U.S.C. 672(i). Such "ratings" were never considered to have to be specifically authorized. Probably a defender of some unreasonably taken position could argue that there are "staff department" ratings and are therefore "specifically" authorized under 46 CFR 12.02-11(e)(3), by the words "however endorsed." It would be unfair to point out here that there is a discrepancy between this subparagraph and the inferences drawn from the enumeration in 12.25-10(a), but it is much to the point to realize that there is no way in which a "cattleman," or "horseman," can be called a member of the staff department. These ratings exist. If it is necessary, to validate their existence, to squeeze them into the staff department, an "industrial worker" can be so squeezed.

On the other hand, since there is no sacrosanct inviolability about the "departments," even in our own regulations, there is no bar to issuing the "industrial worker" "endorsement" as just a new kind of department on a new kind of vessel.

It is proposed that there is absolutely no bar to issuance of a merchant mariner's document suitably "endorsed" to serve as a certificate of identification for a seaman whose certificate of service would designate a "rating" of "industrial worker" without an amendment to the regulations. (That implications of this understanding could well be explored toward a better understanding of the entire seaman's certificate problem need not be further elaborated.)

"DEPARTMENTS" IN THE STATUTES

The law on "departments" of a vessel is not fully prescriptive. It is to be gathered, if at all, from phrasing in definite contexts reflecting in part customary practices and usage never themselves prescribed by statute. Two "departments" are specifically named in "seamen's statutes,"

"engine department" in 46 U.S.C. 672 and "staff department" in 46 U.S.C. 242. "Each" department" is mentioned in the first sentence of 672, but the "AB" provision speaks only of "deck crew." The term "steward's department" appears in the statute only at 46 U.S.C. 1132 when, in a legislative jungle, something of an exception is made for resident aliens on passenger vessels.

672 and 1132 recognize the existence of engine and steward's departments as existing things, not at all creatures of statute. If there is a "deck department" among the departments of a vessel (see first sentence of 672), it is so well recognized that it doesn't have to be named or can be referred to by a possibly cognate term, "deck crew." The "staff department" is almost ludicrous, even in its legislative history. But it too, although some of the language of the law appears to be creative ("There shall be registered staff officers in the United States merchant marine..."), is recognized, insofar as it is a "department," as preexisting. Note also that even statutory recognition did not occur to the "engine department" and the "steward's department" until 1936, or to the "staff department" until 1939.

The concept of "department," while convenient and realistic, is not even defined, much less statutorily cast, and need not, if the law itself is otherwise open, inhibit progress.

G-LMI memo 16721 of 25 February 1980 to G-LRA

HOUSING/QUARTERS ALLOWANCE ENTITLEMENT OF MEMBERS
MARRIED TO MEMBERS WHEN BOTH ARE ASSIGNED TO SEA DUTY

1. When a member is married to a member and both are assigned to sea duty on different vessels, but in the same geographic area,

a. Is either member entitled to BAQ?

b. If neither member is entitled to BAQ, may housing be leased for them under 14 U.S.C. 475(a)?

2. In answer to question a., neither member is entitled to BAQ; however, each is entitled to "partial BAQ" under 37 U.S.C. 1009(d). In 57 Comp. Gen. 194, at 198 (1977), the Comptroller General states that even though 37 U.S.C. 401(1) defines "dependent" as including a "spouse," a member on sea duty who is married to a member is considered without dependents by virtue of 37 U.S.C. 420. Accordingly, such a member is not entitled to BAQ under 37 U.S.C. 403(c). Such a member is, however, entitled to "partial BAQ" under 37 U.S.C. 1009(d). There is no basis in law to apply this ruling differently because both members are on sea duty.

3. In answer to question b, quarters may not be leased for members married to each other who are both on sea duty. The fact that they are married does not alter the fact that they are personnel on sea duty. However, unoccupied government quarters, leased or otherwise, that exceed current Coast Guard needs may be used by personnel on sea duty.

G-LGL memo of 5 February 1980

ACQUISITION OF LAND FOR USE BY THE
COAST GUARD: PURCHASE vs DONATION

Regarding a proposed acquisition of land by the Coast Guard, information published by OST's Assistant General Counsel for Operations and Legal Counsel on 24 June 1976 discusses the application of the policies established by section 301 of the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (42 U.S.C. 4651), set forth in pertinent part as follows:

The Uniform Relocation Assistance and Real Property Acquisition Act of 1970 was intended to establish a "uniform policy for fair and equitable treatment of persons who have their real property taken for Federal and Federally-assisted programs" (H.R. Rep. 91-1656, p. 1). Title III of the Act governs the land acquisition process.

Section 301 establishes "policies" by which Federal agencies are to be "guided" in their own property acquisitions to the greatest extent practicable. These policies include requirements, inter alia, that:

Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

Before his negotiations for real property, the head of the Federal agency concerned shall establish an amount he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approval appraisal of the fair market value of such property.

The terms "policies," and "guided," and "to the greatest extent practicable" should not be understood to give agencies wide discretion in applying § 301. Rather, the section commands agencies to follow the stated policies except where they cannot reasonably do so. Congress intended that § 301

set forth "a Congressional mandate of [9] provisions which must be followed in the taking of property for Federal purposes" (115 Cong. Rec. (Pt. 23) 31533 (1969); emphasis added). Neither the text nor the legislative history of the URA indicate that the action of any other party, including a property owner, can relieve agencies of the duties created by § 301.

While § 301 creates duties for agencies, it creates no rights for property owners. Section 102(a) of the URA [42 U.S.C. § 4602(a)] says that the provisions of § 301 "create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation." This provision prevents court review under § 301 of agency action [Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo., 1973)]. Because § 301 creates no rights, the benefits it provides are not waivable. A waiver is a knowing and voluntary relinquishment of a right. A property owner cannot waive a right he does not have. An exception to strict compliance may be made when the property owner, a large business, corporation or institution including a city (the proposed grantor in this case), spontaneously requests that the appraisal/offer process not take place with respect to an acquisition not involving displacement, serious damage to or serious reduction of the value of the property.

Although Public Law 91-646 speaks only of negotiation and purchase or condemnation in respect to appraisals, it might be desirable to have an appraisal in the event of a donation of land by the city. This might be of significance to Congress and the Coast Guard in view of the desires of the grantor to obtain accommodations for its police and fire departments without charge, especially if provision of these accommodations is to be used as consideration for the acquisition, as discussed in the next paragraph.

In the absence of Congressional approval, accommodation of the city police and fire departments by providing 1800 square feet of office and limited dock space for no charge would appear to be improper. Although 14 U.S.C. 93(n) is authority for the Commandant to rent or lease, under such terms and conditions as are deemed advisable, for a period not exceeding five years, such real property under the control of the Coast Guard as may not be required for immediate use by the Coast Guard, this building space has yet to be constructed. The Coast Guard will in effect be constructing building and dock space for use by the city. Moreover, it appears that the city desires a lease in excess of five years which is beyond the allowable statutory period. Thus, for the above reasons, 14 U.S.C. 93(n) would not apply. However, the providing of the building and dock space to the city may be considered a form of remuneration or consideration for the

Coast Guard to obtain the property. This would make the acquisition a purchase rather than a donation. It should be noted that the consideration of providing office and dock space must be made contingent upon appropriations for construction of the improvements. The practical effect of using provision of this space to the city as consideration for the acquisition is that an offer of the space may now be made and the necessary Congressional action would be the subsequent passage of a bill including appropriations for the improvements, which must be obtained anyhow.

Regulations of the Attorney General promulgated in accordance with the provisions of Public Law 91-393, approved September 1, 1970, 84 Stat. 835, provide that when permanent type improvements or improvements of substantial value are to be erected on lands, a defeasible title (or reverter provision) to such lands is not acceptable and must not be approved, unless the estate is clearly authorized by Congress. Title 14 U.S.C. 92(f) and the applicable Congressional authorization and appropriation acts authorize such an estate. When it is desired to accept the title to lands, subject to any rights of reversion, the opinion of the Attorney General must be requested and full supporting facts containing a reference to any authorizing authority must be submitted for consideration. In this case, the Department of Justice also desires to be involved in the approval of the language used in the reversionary clauses during the negotiation stage.

G-LGL Memo 11011 of 27 February 1980

DISPOSAL OF UNCLAIMED VESSELS

Property rights may not be interfered with under the United States Constitution without due process of law. (U.S. Const. Amd. V) The disposition of unclaimed property is governed by 10 U.S.C. § 2575. The Secretary of Transportation is authorized to dispose of all lost, abandoned, or unclaimed personal property that comes into the custody or control of his department, with certain delineated exceptions dealing with personal effects. There is a requirement to make a diligent effort to find the owner. If the owner is determined, but not found, the property may not be disposed of for 120 days after notice is given by certified or registered mail to the person's last known address. Moreover, the search is not limited to mere owners. The duty includes efforts to locate heirs, next of kin or legal representatives. There is no authority to summarily dispose of these vessels where the owner, heirs, next of kin or legal representative is determined and found. If an identified owner is incapable of or refuses to remove the vessel, the

Coast Guard may seek to have a maritime lien attached. It would be an unconstitutional taking of property, without due process of law, to arbitrarily destroy the vessel of a known, identified owner. The criteria must be limited to (1) diligent efforts to determine ownership which are unsuccessful, or (2) an abandonment of the vessel by the owners as evidenced by a signed document transferring ownership to the Coast Guard, to be valid.

Even after no owner has been determined, the property may only be disposed of without delay if it has a fair market value of less than \$25.00. If the fair market value is \$25.00 or more, the property may not be disposed of until three months after the date it is received at a storage point designated by the Secretary. Thus the term "no commercial value" is irrelevant to the determination to be made by the informal board of survey. The board must make a determination that the vessel has a market value of less than \$25.00. This may be accomplished by demonstrating that it is not economically feasible to maintain the vessel (i.e., the cost to eliminate the health hazard and remove the vessel exceeds the value of the vessel).

It is foreseeable that a situation may arise where immediate disposal is necessary. Immediate, indicates an extremis situation where the health, welfare or safety of the public is seriously threatened. If an extremis condition does exist the law regarding public nuisances would apply. The commanding officer would have the right to use all reasonable force necessary to abate the nuisance, including the destruction of the vessel, where the damage done is not greatly disproportionate to the threatened harm. The key in that situation is reasonableness. The force used cannot be excessive in comparison to the gravity of the nuisance. The existence of any reasonable alternative method (i.e., quarantine) must be considered in determining reasonableness, with the understanding that there will be exposure to liability for any excess.

G-LGL Memo 4500 of 5 February 1980

ENTITLEMENT TO FAMILY SEPARATION ALLOWANCE

Several layers of "Judicial gloss" have been applied by the Comptroller General to Clause (2) of section 427(b) of Title 37, U.S. Code which authorizes payment of a family separation allowance of \$30 a month to certain members entitled to basic allowance for quarters for dependents if-

"he is on duty on board a ship away from the home port of the ship for a continuous period of more than 30 days;
. . ."

The Comptroller General has held a member entitled to FSA while on temporary duty, shore patrol duty, hospitalization ashore, or on authorized leave while the ship remains away from its home port. 43 Comp. Gen. 332. The entitlement only continues until the ship returns to its home port. The common theme in each of these opinions is that the vessel remained away from its home port for more than 30 days, regardless of the separation of the member.

In December 1964, the Comptroller General had the opportunity to address the issue of entitlement to FSA when the vessel returned to its home port for 1 hour and 39 minutes during a five week period. The issue was presented by the Commandant and involved the USCGC STORIS (WAG-38). The Comptroller General stated in 44 Comp. Gen. 324, 325;

"Under the plain language of the statute, payment of the allowance under clause (2) is not authorized unless the ship remains away from its home port for a continuous period of more than 30 days. No exception to that requirement is authorized by statute for any reason and there is nothing in the legislative history of the law to indicate that any exception to that requirement was contemplated by Congress. In such circumstances we may not read any exceptions into the statute. Hence, the return of a vessel to its home port before the expiration of the qualifying period, no matter how brief its stay, must be viewed as interrupting its absence from the home port for purposes of the statute."

The opinion went on to hold that payment of the FSA is not authorized.

It is clear then that the touchstone for entitlement is not measured in terms of separation from family, or hardship to personnel at all, but rather by a technical, ministerial determination that a ship remained away from its home port for a continuous period of more than 30 days. A clearer case of form over substance in statutory interpretation would be hard to find. Although the hardship, and seeming insensitivity to our crew members, of this opinion is readily apparent, the rule of law draws a bright line.

G-LGL Memo 5420/1 of 8 January 1980

COAST GUARD PARTICIPATION IN METRO PASS SUBSIDY

An "experimental" subsidy program is proposed under which the Coast Guard would purchase Seattle METRO transit system passes for resale to members at a discounted rate for home-to-work transportation.

There are legal problems because appropriated funds would be used. The first problem is that which would be subsidized, home-to-work transportation for employees. The second, related problem is that appropriated funds would be used for payment of employees' personal obligations. The fact that an "experimental" program would be used does not dispose of these problems. In this regard, the Traverse City "cash" mess experiment is distinguishable. (See below)

It is also arguable that the proposal would violate 31 U.S.C. 638a(c), at least in spirit. Section 638a(c) prohibits the use of Government owned, leased, or hired vehicles for home-to-work transportation for employees. It could be argued that the subsidy method is tantamount to a hiring of vehicles, which violates the section. In this regard, the Comptroller General has stated that § 638a(c) "specifically recognized the well established rule that a Government employee must bear the cost of daily travel between his home and place of employment." (54 Comp. Gen. 106 (1975))

It follows that the proposed subsidization would also violate the general rule that the Government cannot use appropriated funds for the payment of personal obligations. (Henriquez and Cornell, Inc. v. United States, 180 Ct. Cl. 1040 (1967)) Specific statutory authority is required.

The Traverse City mess experiment had a legal basis (37 U.S.C. 402). Also, a key difference between the Traverse City situation and the proposal is that the "cash" mess in Traverse City was to be conducted on a non-subsidization basis with the members paying no less than the actual price of the raw food.

As an alternative to seeking statutory authorization for the proposal, a non-appropriated fund program could be established on a revolving basis with the members partially reimbursing the fund. This has the added advantage of being able to use the monies reimbursed by the members. If appropriated funds were used, the monies reimbursed would have to be deposited in the miscellaneous receipts account of the Treasury (31 U.S.C. 484) unless there were a specific statutory exception.

LGL Memo 5000 of 23 January 1980

A BOOKER CONSULTATION ESTABLISHES AN ATTORNEY-
CLIENT RELATIONSHIP THEREBY DISQUALIFYING THE
ATTORNEY FROM SERVING AS THE SUMMARY COURT-MARTIAL

[The accused] was tried on 8 and 9 November 1979 by summary court-martial convened by the commanding Officer, USCGC

VIGOROUS (WMEC 627). He was charged with unauthorized absence from 20 October 1979 until 1 November 1979 in violation of Article 86, UCMJ, 10 USC 886, with missing movement of USCGC VIGOROUS through design on 3 October 1979 in violation of Article 87, UCMJ, 10 USC 887, with violating U.S. Coast Guard Shipboard Regulations by possessing marijuana on 5 October 1979 in violation of Article 92, UCMJ, 10 USC 892 and with specifications alleging, respectively, unlawful entry of the USCGC VIGOROUS galley and with wrongfully having a key to the VIGOROUS galley in his possession both on 27 September 1979 in violation of Article 134, UCMJ, 10 USC 934. He was found guilty on his guilty pleas of the unauthorized absence and missing movement offenses and was convicted despite his not guilty plea of unlawfully entering the VIGOROUS galley. The summary court-martial dismissed the specification alleging wrongful possession of the galley key for failure to state an offense and found the accused not guilty of the marijuana charge. The court sentenced the accused to be confined at hard labor for 22 days and to forfeit \$295.00 per month for one month. The findings of guilty and the sentence were approved by the convening authority and by Commander, Third Coast Guard District.

. . . An Acknowledgement of Rights Form attached to the record of trial as required by Section 306-3 of the Coast Guard Military Justice Manual, CG-488, shows that prior to signifying his acceptance of trial by summary court-martial the accused consulted with . . . a lawyer of the Third Coast Guard District Legal Office [the SCM] on 8 November 1979.

Thus the Officer who established an attorney-client relationship with the accused respecting his rights in the case prior to trial subsequently served as summary court-martial in the same case.

The procedure followed in this case is authorized by Paragraph 79d, Manual for Courts-Martial, 1969, (Rev.) but the procedures set forth in that paragraph were found inadequate by the Court of Military Appeals in U.S. v. Booker, 5 M.J. 238 (CMA 1977) and additional requirements were prescribed. Among the new requirements announced by the Court was a requirement that an accused be afforded the right to confer with an independent legally trained counsel. With respect to the requirement the Court said:

"The consequences of a decision to accept either an Article 15 or a summary-court-martial disciplinary action under Article 20 involve due process considerations. Believing as we do that only a legally

trained person can supply the requisite quantum of information necessary for an informed decision, we believe it mandatory that the individual to be disciplined must be told of his right to confer with an independent counsel before he opts for disposition of the question at either of the above levels."
5 M.J. at 243.

There is no indication in the record that [the accused] was informed of or afforded his right to consult with independent counsel before opting for disposition of his case by summary court-martial. Thus, the requirements of U.S. v. Booker were not met.

This record presents the further question of whether a lawyer who has established an attorney-client relationship with an accused respecting a case may thereafter serve as summary court-martial in the same case. The Uniform Code of Military Justice and the Manual for Courts-Martial do not mention the possible disqualification of summary courts-martial and require only that a summary court-martial be a commissioned officer. Article 16(3), UCMJ and paragraph 4d, MCM, 1969, (Rev.). Nor is there provision for challenging a summary court-martial either peremptorily or for cause. The remedy for the accused who is not satisfied with the summary court-martial as a forum or with the commissioned officer appointed as the summary court-martial to try his case is to object to trial. Article 20, UCMJ, and paragraph 16a, MCM, 1969 (Rev.). Nevertheless, the interests of justice would dictate that a summary court-martial should not be permitted to fill inconsistent roles in connection with the same trial nor should an officer be permitted to serve as a summary court-martial in a case if his prior actions would disqualify him to serve as a member or military judge in the same case. See Canon 3 C (1)(b), Code of Judicial Conduct of the American Bar Association as amended August 1977; Articles 25(d)(2), 26(d) and 27(a), UCMJ; paragraph 62f(6) and (13), MCM, 1969 (Rev.). Cf. Paragraph 5c, MCM, 1969. (Rev.).

The Chief Counsel has recently held that the consultation between an accused and an attorney in compliance with U.S. v. Booker, *supra*. and Section 306-2 of the Military Justice Manual concerning the accused's rights with regard to accepting or refusing trial by summary court-martial establishes an attorney-client relationship which thereafter renders the attorney ineligible for service as a member of the government's legal staff to review the record of trial pursuant to Article 65(c), UCMJ. U.S. v. Britt, Chief Counsel action of 24 September 1979. Applying the rationale of that holding to this case, [the Third District staff

attorney] was disqualified to serve as summary court-martial for the trial of [the accused] after serving as his pretrial counselor. As a result, the accused's substantial rights were materially prejudiced. See U.S. v. Green, 5 USCMA 610, 18 CMR 234 (1955); U.S. v. Truley, 8 USCMA 262, 24 CMR 72 (1957); U.S. v. Collier, 20 USCMA 261, 43 CMR 101 (1971); U.S. v. Williams, 21 USCMA 292, 45 CMR 66 (1972).

The findings of guilty and the sentence are set aside. The charges may be referred to another court-martial for trial or they may be dismissed. In the event of dismissal, all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and the sentence set aside by this action will be restored.

Action pursuant to Article 69, UCMJ, U.S. v. Rudy, 11 Feb 1980; see also action pursuant to Article 69, UCMJ, U.S. v. Sofia, 19 Feb 1980.

ACCUSED'S OBJECTION TO TRIAL BY SCM AFTER ARRAIGNMENT
AND BEFORE THE FIRST WITNESS IS CALLED CAN BE TANTAMOUNT
TO A MOTION TO WITHDRAW PRIOR CONSENT TO TRIAL BY SCM

[The accused] was tried by a summary court-martial convened by the Commanding Officer, Staff Enlisted Personnel, Commander, Seventh Coast Guard District, Miami, Florida on 29 May and 7, 12 and 21 June 1979. The accused pleaded not guilty to charges and specifications alleging, respectively, willful disobedience of the order of an Air Force Security Policeman at Homestead Air Force Base on 2 April 1979 in violation of Article 91, UCMJ, 10 USC 891, operating a passenger car while under the influence of alcohol on board Homestead Air Force Base on 2 April 1979 in violation of Article 111, UCMJ, 10 USC 911, wrongfully having in his possession a small amount of marijuana residue, marijuana seeds and [one] marijuana cigarette (partly burnt) on board Homestead Air Force Base on 2 April 1979 in violation of Article 134, UCMJ, 10 USC 934, and unauthorized absence from his unit from 0730, 19 April 1979 until 0728, 20 April 1979 in violation of Article 86, UCMJ, 10 USC 886. The summary court-martial dismissed the charge and specification alleging a violation of Article 111, UCMJ, but found the accused guilty of the remaining charges and specifications. The court sentenced the accused to be reduced to pay grade E-5 and to forfeit \$50.00 pay for one month.

The sentence was approved by the convening authority on 26 June 1979 and this action was reaffirmed by the convening authority 1 August 1979, 8 August 1979 and again on an unspecified date. Commander, Seventh Coast Guard District, the officer exercising general court-martial jurisdiction,

approved the findings of guilty and the sentence on 22 October 1979.

Page 4 of the charge sheet contains a mark in the appropriate block indicating that the accused had been advised in accordance with paragraph 79d, MCM, 1969 (Rev.) but the boxes indicating the accused's consent or objection to trial by summary court-martial are blank and neither the space provided for the accused's signature to signify his consent to trial nor the space provided for the summary court-martial's signature returning the charges to the convening authority if the accused refused trial by summary court-martial bears a signature as required by paragraph 79d, MCM and by the charge sheet itself.

A letter dated 22 June 1979 from the summary court-martial to the convening authority contains the following pertinent statements relating to the issue of the accused's consent to trial by summary court-martial:

"1. * * * The accused consented to trial by summary court and the following is a summary of the ensuing events:

* * *

"2. I then explained to the defendant his rights concerning his own testimony, his rights concerning objecting to trial by summary court, the decision of the convening authority whether to refer the case to trial by special or general court martial and if the defendant elected to object to trial by summary court, the increased severity of punishment a special or general court martial could impose his right to counsel.

"3. The defendant in closed session with me indicated that he did not object to trial by summary court but to trial by this particular summary court officer . . . , as he heard rumors and felt that I was racially biased. At this time I insured the defendant that I would conduct myself as required by regulations and he could be assured "that I would conduct a fair and impartial trial to the best of my abilities. If in making his decision to accept trial by summary court, he was questioning the integrity of the summary court officer and needed

other reassurance to the fact that I would do my duty as required, I would arrange for a counseling session between the defendant and . . . , my reporting superior and also the Seventh District Civil Rights Officer. I made an appointment with [my reporting superior] to counsel [the accused] and the court recessed until the counseling session was concluded. Two minutes before the scheduled meeting with [my reporting superior] [the accused] indicated that he no longer desired to talk to [my reporting superior], and I reconvened the trial. I asked the defendant if he understood his rights as I explained them, to which the defendant answered in the affirmative. I then asked if he objected to trial by summary court. He answered, "No, sir." At this time I failed to have the defendant sign the charge sheet, but I do have a tape of the statement."

The resume then relates that the accused made various motions for dismissal of the charges or for other relief all of which were denied. The accused was subsequently arraigned and entered a plea of not guilty to all charges and specifications. With respect to the ensuing trial the resume states in part: "5. * * * The defense continued to object to the proceedings. These objections were overruled.
* * *"

On 12 July 1979 [the accused] addressed a letter to Commander, Seventh Coast Guard District, "Subj: Summary Court-martial of 29 May - 21 June 1979; appeal to Supervisory Authority." Among other alleged errors the accused asserted:

"2. * * * I did not request a summary, nor did I acknowledge my consent in writing on page 4 of the Charge Sheet. On the very first day of the trial, I strongly objected to the trial and demanded trial by SpCM. The SCO ruled that I indicated no when asked if I objected to trial by him. I was of the opinion that my option to whether I consent or decline Summary would be stated as such, then acknowledged with a signature on page 4 of the Charge Sheet at a given point in the proceedings; not in the form of a trick phrase. * * *"

The letter of appeal was submitted to the summary

court-martial and by memorandum of 23 July 1979 that officer submitted additional pertinent comments respecting the issue of whether the accused had consented to trial as follows:

"1. As stated in [his letter of appeal] [the accused] did not acknowledge in writing his consent to trial by Summary Court. He did, however, agree to trial by Summary Court which I have on tape. He did so after I followed the specific Pre-Trial procedure and conducted the Court in accordance with [the Manual for Courts-Martial]. [CCGDTWELVE Instruction 5813.2 of 19 July 1977] was followed verbatim in this proceeding. At the time I realized that I did not have his signature consenting to trial by summary court I contacted district legal. They advised me that the oversight was not fatal to continuing the proceedings. I also, as explained [in my letter of 22 June 1979], have a tape of proceedings. [The accused] started to object to trial when I did not sustain his objections to hearing testimony from the Air Force security policeman. * * *

By memorandum of 31 July 1979 the Acting District Legal Officer returned the record of [the accused's] trial to the summary court-martial for preparation of a summary of all evidence received at trial relating to the offenses of which the accused had been convicted as required by Section 500-1(b) of the Military Justice Manual, CG-488, and for preparation of a verbatim transcript of the portion of the trial dealing with the advice of rights respecting trial by summary court-martial and the consent to trial since no writing signed by the accused acknowledging his understanding of rights and consenting to trial by summary court-martial was attached to the record of trial as required by Section 306-3 of the Military Justice Manual.

The summary court-martial by Memorandum dated 6 August 1979 submitted a purported summary of the testimony of only some of the witnesses. He also attached a transcript showing his advice to the accused respecting his rights and including the exchange between the summary court-martial and the accused relied upon as establishing consent to trial as follows:

" [SCM] : * * * If you have any questions concerning the matter of objecting the trial, I will be glad to answer them. If you want some time to consider whether you wish to object to trial by summary

court martial, I will postpone the case for a period of time long enough for you to decide. Do you want some additional time to make up your mind or consult with a lawyer?

"ACCUSED: I would like some additional time to clarify some matters with the summary court officer, a closed session.

" [SCM] : Ok, In other words you want to talk to me in private?

"ACCUSED: Yes sir. (Tape turned off for closed session)

" [SCM] : The Court will come to order. Do you understand all the rights I have explained?

"ACCUSED: Yes, sir.

" [SCM] : Do you object to trial by summary court-martial?

"ACCUSED: No, sir.

" [SCM] : The charges and specifications against you which have been referred to the trial are as follows: * * * "

The closed session evidently included the events described in the summary court-martial's letter of 22 June 1979, i.e. the accused stating that he did not object to trial by summary court-martial as such but that he did object to trial by [this particular officer] as the summary court-martial "as he heard rumors and felt [he] was racially biased;" [the officer's] reassurance of the accused that he would conduct himself as required by regulations and "that [he] would conduct a fair and impartial trial to the best of [his] abilities," and, [the officer's] arrangements for the accused to talk with [his reporting superior] which the accused subsequently declined to do. In that setting, the accused's answer of "No, sir" when asked whether he objected to trial by summary court-martial remained equivocal since it did not clarify the issue of whether he no longer objected to trial by [the officer] as the summary court-martial or whether he was merely reiterating his former position that he did not object to trial by a summary court-martial other than [that officer].

There is no other indication in the record that the accused

consented to trial by summary court-martial.

The various resumes reveal that the accused thereafter objected to trial before the first witness was called and his assertion in his letter of appeal that "On the very day of the trial, I strongly objected to the trial and demanded trial by SpCM" has not been refuted.

Article 20, Uniform Code of Military Justice, 10 U SC 820 and paragraph 16, Manual for Courts-Martial, 1969 (Rev.) provide that "No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto." Thus, the accused's consent is a jurisdictional prerequisite to trial by summary court-martial. Paragraph 79d, MCM, 1969 (Rev.) and page 4 of the charge sheet make clear that the consent to trial must be indicated by a mark in the appropriate box on page 4 of the charge sheet verified by the accused's signature. This requirement that the accused's written consent is a prerequisite to trial by summary court-martial after full explanation of his rights was reaffirmed and expanded in U.S. v. Booker, 5 M.J. 238 (CMA 1977) at 243 where the Court of Military Appeals said,

"The consequences of a decision to accept either an Article 15 [UCMJ] or a summary court-martial disciplinary action under Article 20 [UCMJ] involve due process considerations. Believing as we do that only a legally trained person can supply the requisite quantum of information necessary for an informed decision, we believe it mandatory that the individual to be disciplined must be told of his right to confer with an independent counsel before he opts for disposition of the question at either of the above levels. * * * A waiver of statutory right under Articles 15 and 20 for removal to trial in a criminal proceeding must be in writing."

A similar affirmative requirement that the accused's consent to trial by summary court-martial must be evidenced by a writing signed by him is contained in Section 306-3 of the Military Justice Manual, CG-488, Change 1 published 26 March 1979, as follows:

"An accused may accept trial by summary court-martial with or without prior consultation with a law specialist. His decision to accept, however, must be

reflected in a writing which will on its face show it to be a voluntary and knowing one. In addition, it must bear the personal signature of the accused. Appendix III-C, or an equivalent form, shall be used in all cases where the accused had been offered trial by summary court-martial and has accepted it. The original will be attached to the record of trial." (underscoring added)

No such writing is attached to this record nor is there any other writing or signature of the accused evidencing his understanding of his rights or his consent to trial by summary court-martial. Certainly there is no showing on the face of this record that the accused made a voluntary and knowing decision to accept trial. This omission alone would warrant disapproval of the findings of guilty and the sentence for lack of jurisdiction or for failure to comply with applicable regulations. For as the Court of Military Appeals said in U.S. v. Russo, 23 USCMA 511, 50 CMR 650, 1 M.J. 134 (CMA 1975) 50 CMR at 651:

It is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests. American Farm Lines v. Black Ball Freight Service, 397 US 532 (1970); United States ex rel. Accardi v. Shaughnessy, 347 US 260 (1954)."

Accord, U.S. v. Dunks, 1 M.J. 254 (CMA 1976); U.S. v. Samara, 6 M.J. 360 (CMA 1979); Dettinger v. U.S., 7 M.J. 216 (CMA 1979). See also U.S. v. Dean, 20 USCMA 212, 43 CMR 52 (1970).

Even assuming that the accused's reply of "No, sir" in response to the summary court-martial's inquiry, "Do you object to trial by summary court-martial?" after he had formerly objected to trial was sufficient to clothe the summary court-martial with trial jurisdiction at the outset, the accused's subsequent renewal of his objection to trial after arraignment and before the first witness was called was tantamount to a motion to withdraw any prior assent to trial by the summary court-martial as then constituted. Under the circumstances of this case involving an importuned and equivocal failure to object to trial following an unrecorded private conversation in which the summary court-martial through his own entreaties and promised reassurance by a senior officer of the staff endeavored to persuade the accused of his fairness and impartiality, the motion to

withdraw consent should have been granted. See U.S. v. Wright, 5 M.J. 106 (CMA 1978). Cf. U.S. v. Thorpe, 5 M.J. 186 (CMA 1978); U.S. v. Jeanbaptiste, 5 M.J. 374 (CMA 1978); U.S. v. Thomas, 7 M.J. 299 (CMA 1979).

The findings of guilty and the sentence are set aside. The charges may be referred to another court-martial for trial or they may be dismissed. In the event of dismissal, all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and the sentence set aside by this action will be restored.

Action pursuant to Article 69, UCMJ, U.S. v. Henderson, 11 Feb 1980.

A BOOKER CONSULTATION ESTABLISHES AN ATTORNEY-CLIENT RELATIONSHIP RENDERING THE ATTORNEY INELIGIBLE TO PERFORM THE ARTICLE 65 (C) UCMJ, REVIEW IN THE SAME CASE

[The accused] was tried by a summary court-martial convened by the Commanding Officer, U.S. Coast Guard Cutter POLAR SEA (WAGB 11) on 6 September 1979. He pleaded guilty to and was convicted of a single charge and specification alleging unauthorized absence from POLAR SEA from 7 June 1979 until 3 August 1979 in violation of Article 86, Uniform Code of Military Justice, 10 USC 886. The court sentenced the accused to be reduced to pay grade E-1, to forfeit \$100.00 per month for two months and to perform hard labor without confinement for thirty days.

The findings of guilty and the sentence were approved by the convening authority on 11 September 1979 and by Commander, Thirteenth Coast Guard District on 11 October 1979.

By letter dated 7 September 1979 the summary court-martial provided the Commanding Officer, U.S. Coast Guard Cutter POLAR SEA a resume of the proceedings including an enclosure entitled "Notification of Rights and Consent to Proceedings" executed by the accused 23 August 1979 and showing that he had been counseled by . . . a military lawyer of the Thirteenth District Legal Office. The action taken 11 October 1979 by Commander, Thirteenth Coast Guard District as the officer exercising general court-martial jurisdiction states that the record of trial had been reviewed in accordance with the requirements of Article 65(c), Uniform Code of Military Justice by [that same military lawyer], a law specialist attached to the command.

The Chief Counsel has recently held that the consultation between an accused and an attorney in compliance with U.S. v. Booker, 5 M.J. 238 (CMA 1977) and Section 306-2 of the Coast Guard Military Justice Manual, CG-488, concerning the

accused's rights with regard to accepting or refusing trial by summary court-martial establishes an attorney-client relationship which thereafter renders the attorney ineligible for service as a member of the government's legal staff to review the record of trial pursuant to Article 65(c), UCMJ. U.S. v. Britt, Chief Counsel action of 24 September 1979. Any prejudice to [the accused] by virtue of [the military lawyer's] inconsistent roles as the pretrial counselor of the accused and subsequently as the law specialist reviewing the record of trial is limited to the review and action of the officer exercising general court-martial jurisdiction and did not deprive the accused of a fair trial. See U.S. v. Daigneault, 30 CMR 918 (AFBR 1971).

The action of the Commander, Thirteenth Coast Guard District is set aside. The record of trial will be forwarded to another officer exercising general court-martial jurisdiction for review pursuant to the provisions of Article 65(c), UCMJ.

Action pursuant to Article 69, UCMJ, U.S. v. Stevens, 30 Jan 1980; see also action pursuant to Article 69, UCMJ, U.S. Richards, 21 Feb 1980.

ACCUSED'S ORAL WAIVER OF RIGHTS AND SIGNATURE ON PAGE 4 OF THE CHARGE SHEET, SIGNIFYING CONSENT TO TRIAL BY SCM, DOES NOT FULFILL THE REQUIREMENTS OF BOOKER

ABSENT COMPLIANCE WITH THE MJM'S REQUIREMENTS ESTABLISHED TO COMPLY WITH BOOKER A SCM IS WITHOUT AUTHORITY TO PROCEED

[The accused] was tried on 18 and 19 December 1979 by a summary court-martial convened by the Commander, Coast Guard Group, Detroit, Michigan. The accused pleaded not guilty to but was convicted of ten specifications alleging violations of Article 86, Uniform Code of Military Justice, 10 USC 886. The summary court-martial sentenced the accused to be restricted for one month, to perform hard labor without confinement for forty five days and to be reduced to pay grade E-3. The convening authority substituted extra duty for the hard labor without confinement and otherwise approved the findings and sentence. Commander, Ninth Coast Guard District approved the findings and sentence as approved by the convening authority.

In his action on the record the Commander, Ninth Coast Guard District noted that the record did not contain an "Acknowledgement of Rights - Acceptance of SCM" form as required by Section 306-3 of the Coast Guard Military Justice Manual, CG-488. Nevertheless, it was concluded that the requirements of U.S. v. Booker, 5 M.J. 238 (1977) had been satisfied since the accused had orally waived his right to

consult with counsel and had signified his consent to trial by summary court-martial by signing page 4 of the charge sheet.

In U.S. v. Booker, supra, the Court of Military Appeals found the requirements of Paragraph 79d, Manual for Courts-Martial, 1969 (Rev.) including the accused's signature on page 4 of the Charge Sheet acknowledging his consent to trial insufficient to establish that the accused had voluntarily, knowingly and intelligently waived his right to have his case removed to a full criminal proceeding such as a special court-martial. Therefore the Court prescribed additional safeguards as a prerequisite to trial by summary court-martial as follows:

"The consequences of a decision to accept either an Article 15 or a summary court-martial disciplinary action under Article 20 involve due process considerations. Believing as we do that only a legally trained person can supply the requisite quantum of information necessary for an informed decision, we believe it mandatory that the individual to be disciplined must be told of his right to confer with an independent counsel before he opts for disposition of the questions at either of the above levels. * * * A waiver of the statutory right under Articles 15 and 20 for removal to trial in a criminal proceeding must be in writing." (underscoring added) 5 M.J. at 243.

The foregoing language was amplified in Footnote 20 also at 5 M.J. 243 as follows:

"20. It is imperative that this written waiver establish a voluntary, knowing, and intelligent decision to forego removal to a criminal proceeding which was done with sufficient awareness of the relevant circumstances to satisfy the standards set forth in Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970). Any ambiguity must be resolved prior to the utilization of evidence of discipline under either codal provision. This is required because the individual in making this

decision is actually waiving his right to a full adversary criminal proceeding with its attendant Fifth and Sixth Amendment protections under Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 492, 9 L.Ed.2d 799 (1963).

An accused's oral waiver of rights accompanied by his signature on page 4 of the Charge Sheet signifying his consent to trial by summary court-martial simply does not fulfill the requirements mandated by the Court of Military Appeals in Booker.

The procedures for complying with Booker were prescribed for the Coast Guard in Sections 306-2 and 306-3 of the Military Justice Manual. Respecting an accused's right to consult with counsel and his decision to waive that right, Section 306-2 provides in part:

"The convening authority of his designee is responsible for advising the accused of his right to confer with a law specialist. If an accused desires to waive his right to confer, he shall do so in writing. See Appendix III-C." (underscoring added)

With regard to acceptance of trial by summary court-martial, Section 306-3 of the Military Justice Manual provides:

"An accused may accept trial by summary court-martial with or without prior consultation with a law specialist. His decision to accept, however, must be reflected in a writing which will on its face show it to be a voluntary and knowing one. In addition, it must bear the personal signature of the accused. Appendix II-C or an equivalent form, shall be used in all cases where the accused has been offered trial by summary court-martial and has accepted it. The original will be attached to the record of trial." (underscoring added)

The language of the foregoing provisions of the Military Justice Manual and the sample form attached as Appendix III-C could hardly be clearer in requiring as a prerequisite to trial by summary court-martial the preparation of a writing signed by the accused evidencing either the exercise of his

right to consult with independent counsel or the waiver of that right. Additionally, his decision to accept trial by summary court-martial must be reflected in the writing showing on its face that the decision was voluntarily and knowingly made. Use of Appendix III-C or an equivalent form to be made a part of the record of trial is directed. These requirements were established to ensure compliance with U.S. v. Booker in protecting the personal liberties or interests of military members confronted with the decision of accepting or refusing punishment pursuant to Article 15, UCMJ, or trial by summary court-martial.

The failure of a government agency to comply with its own regulations has often been considered by the Court of Military Appeals and other courts. Addressing the issue in U.S. v. Russo, 23 USCMA 511, 50 CMR 650 at 651, 1 M.J. 134 at 135 (CMA 1975) the Court said:

"It is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970); United States ex rel Accardi v. Shaughnessy, 347 US 260, 750 S. Ct. 499, 98 L. Ed. 681 (1954)."

Accord U.S. v. Dunks, 1 M.J. 254 (CMA 1976); U.S. v. Samora, 6 M.J. 360 (CMA 1979); Dettinger v. U.S., 7 M.J. 216 (CMA 1979); U.S. v. Dillard, 8 M.J. 213 (CMA 1980). See also U.S. v. Dean, 20 USCMA 215, 43 CMR 52 (1970). Cf. U.S. v. Pitre, 41 CMR 811 (NCMR 1970).

Absent compliance with the mandatory requirements of the Military Justice Manual having as their underlying purpose the protection of personal liberties or interests as decreed by the Court of Military Appeals, the summary court-martial was without authority to proceed and the ensuing trial of the accused was invalid.

The findings of guilty and the sentence are set aside. The charges may be referred to another court-martial for trial or they may be dismissed. In the event of dismissal, all rights, privileges and property of which the accused has been deprived by virtue of the findings of guilty and the sentence set aside by this action will be restored.

Action pursuant to Article 69, UCMJ, U.S. v. Brown, 28 Feb 1980.

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